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Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

No. [redacted] 248

Ross E. HEROLD, M.D., Director of Dannemora State Hospital, Dannemora, New York,

Petitioner,

against

ROY SCHUSTER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner;

against

ROY SCHUSTER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner prays for writ of certiorari to review the judgment and decree of the United States Court of Appeals for the Second Circuit entered in this cause on April 24, 1969.

Opinion Below

The opinion of the Court below is not yet reported and is appended hereto *infra* as Appendix A.

Jurisdiction

Jurisdiction of this Court is invoked pursuant to Title 28, United States Code, § 1254(1). The decree of the Court of Appeals was entered on April 24, 1969 reversing the denial of respondent's petition for a writ of habeas corpus by the United States District Court for the Northern District of New York. The decision remanded the case to the District Court with instructions to hear and determine petitioner's application, unless a hearing were held by the courts of the State determining within 60 days from the issuance of the mandate, under the standards set forth in the decision of the Court of Appeals, the issues raised by respondent. Application was made to the Court of Appeals for a stay pending the filing and disposition of this petition for certiorari. That application was denied on May 22, 1969. Application was then made to Mr. Justice Harlan on May 29, 1969; there has been no disposition as yet of this application.

Questions Presented

1. Whether administrative transfer from a prison to a hospital of a mentally ill prisoner in the process of serving a sentence of 25 years to life for second degree murder, presents any basis for Federal intervention where such transfer comports with due process and was in accordance with State Law?

2. Whether administrative transfer from a prison to a hospital of a mentally ill prisoner in the process of serving a sentence of 25 years to life for second degree murder, is violative of the equal protection clause of the Fourteenth Amendment because the transfer procedure differs from that prescribed by statute for civilians not under detention who require hospitalization?

Statement

A.

Respondent was convicted of murder in the second degree on November 2, 1931 and was sentenced by the former Court of General Sessions of New York (Nott, J.) to an indeterminate term of 25 years to life. The conviction resulted from the fatal shooting of his wife on May 2, 1931. He had been separated from his wife for about ten months prior to that time, and on the day of the crime he had met with her and her attorney. Upon being informed that he would have to be accompanied by his own attorney in order to discuss the case, respondent drew a revolver from his pocket and fired two shots at the attorney, hitting him in the left shoulder, and then fired two shots at his wife, one of which entered the back of her head and killed her instantly.

Respondent was committed on November 2, 1931 to Sing Sing Prison, which serves as a reception center for recently sentenced prisoners. On April 4, 1933 he was transferred to Attica State Prison. In his *pro se* brief to the Court below (portions of which are reprinted as Appendix C), respondent maintained that this transfer resulted from his refusal to participate in the prisoners' Christmas show, and that his fellow inmates were gangsters who had threatened that he would be transferred to a worse prison if he continued in his refusal to participate (Appendix C *infra*, p. 57a).

On January 19, 1935 respondent was transferred to Clinton Prison because he was manifesting signs of mental illness and Clinton was in close proximity to Dannemora State Hospital. Respondent claimed in his *pro se* brief to the Court below that this transfer resulted from his refusal to bear false witness as to an attack by a prison official agains an inmate, his refusal to contribute to a fund to buy flowers for a deceased wife of a prison official, and

his attempt to appeal confiscation of art materials to the Commissioner of Correction (Appendix C *infra*, p. 57a).

On September 9, 1941 respondent was transferred to Dannemora State Hospital from Clinton Prison, pursuant to § 383 of the Correction Law of New York as it then read. The transfer was ordered by the Warden of Clinton Prison upon a certificate of lunacy signed and verified by Dr. Leaman H. Caswell, a physician at Clinton Prison. Prior to that time, he had been examined by Dr. Caswell and Dr. Schwartz from Dannemora. On October 9, 1941 respondent appeared before a meeting of the medical staff of Dannemora for diagnosis. The five doctors present were Drs. Webster, Connelly, Schwarz, Drayer and Manjoney. It was the unanimous opinion of the members of the staff that respondent was suffering from a paranoid condition.

The transfer to Dannemora was challenged by respondent in writs of habeas corpus dismissed by the Supreme Court, New York County on July 31, 1950, March 8, 1960 and October 2, 1962.

By petition dated December 27, 1962 respondent applied for a writ of habeas corpus in Supreme Court, Clinton County upon the grounds that (a) his transfer to Dannemora State Hospital was illegal since he was sane, and such transfer was effected solely to present his submission to the State Board of Regents of a deposition concerning a civilian in charge of the Prison School, who allegedly encouraged the prisoners to discuss techniques involved in the commission of crime; (b) his transfer and continued detention were examples of political persecution to prevent the exposure of a Republican sinecurist; and (c) he was presently sane and consequently was being illegally detained. In his petition, the respondent requested that competent counsel be appointed to represent him, and that an open hearing be held on the issue of his sanity. A writ of habeas corpus was allowed by Supreme Court Justice Francis Bergan on January 17, 1963.

Pursuant to such writ, the respondent appeared at a Special Term of the Supreme Court, Clinton County (SODEN, J.), held in Dannemora State Hospital on March 8, 1963. He informed the Court that he intended to retain an attorney and that his relatives would arrange to have him examined by an independent psychiatrist. Justice Harold R. Soden informed the respondent that if he did not retain an attorney within the near future, the Court would be willing to appoint counsel for him, to protect his rights. Thereafter, the respondent wrote to Justice Soden, stating that he desired the assignment of counsel and the appointment of a psychiatrist to examine him and to testify as to his mental condition. On March 29, 1963, the respondent again appeared at Special Term with Robert T. Booth, Esq., the attorney assigned by the Court to represent him. At the respondent's request, the Court granted him more time for the purpose of consulting with Mr. Booth. The matter was adjourned until May 11, 1963 when the hearing was held.

Respondent did not testify at this hearing although he was free to do so. The Court heard the testimony of an independent psychiatrist having no official relationship with the Department of Correction, appointed pursuant to respondent's request. This psychiatrist, Dr. William Carson, stated that in his opinion respondent was mentally ill with a paranoid condition and should not be transferred back to the general prison population (R. 30).*

Commenting that "Mr. Schuster presents all the textbooks characteristics of a paranoid condition . ..." (R. 27), Dr. Carson testified that:

> "I think he is suffering from a mental illness, which must be considered as representing a potential danger to other people, although at no time during his impris-

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* References to the stenographer's page numbers at the hearing before Justice Soden will be indicated by the letter "R".

> onment or his hospitalization has he shown evidence of such overt action. He might go back to a protective environment such as the prison and get along without trouble, and he might not. It would be indefensible in my opinion, at the present time, and in his present condition, to take such a chance." (R. 30).

In explaining that his conclusion concerning Schuster's paranoia was based on more than the charges concerning "corruption" at Clinton, Dr. Carson stated:

> ". . . [T]o believe that a judge of the Supreme Court would offer a patient of Dannemora State Hospital his freedom provided he would agree not to engage in litigation, and to approve that he was sent to the hospital as a punishment, is [a] false premise. . . . It is an unfortunate type of illness because improvement rarely occurs, and the tendency of such patients to litigation, to violent action, invariably result in long periods of hospitalization. . . ." (R. 25)

Justice Soden dismissed the writ on May 25, 1963 and remanded respondent to the custody of the petitioner Herold. The Appellate Division, Third Department, unanimously affirmed this judgment of the Supreme Court, 22 App. Div. 2d 762 (1964). The Court of Appeals granted leave to appeal and on April 15, 1965 unanimously affirmed the order without opinion. 15 N. Y. 2d 968 (1965).

By petition dated July 13, 1965, respondent sought a writ of habeas corpus in the United States District Court for the Northern District of New York. He alleged essentially the same grounds presented in his state petition, i.e., that the proceeding whereby he was judged insane was unconstitutional and, in addition, that he was currently sane. Respondent further urged that the hearing accorded him by the State Supreme Court on May 11, 1963 was insufficient to resolve the issues of his present sanity and the violation of his constitutional rights.

The District Court dismissed the petition on January 26, 1966. On March 24, 1966, Judge Port issued a certificate of probable cause granting respondent leave to appeal from this decision of the Court. Respondent thereupon made application to the United States Court of Appeals for the Second Circuit for the assignment of counsel and leave to appeal *in forma pauperis*. Petitioner cross-moved to dismiss the appeal by affidavit dated July 7, 1966 whereupon the Court of Appeals, by order dated February 28, 1967, vacated the order denying the writ and remanded the action to the Northern District of New York with directions to "grant relator [respondent] an evidentiary hearing on the issue whether his transfer was corruptly motivated with counsel to be assigned to him."

Judge Port, pursuant to the remand of the Court of Appeals, appointed counsel and held a hearing on July 12, 1967. At this hearing respondent attacked the testimony of Dr. Carson on the following grounds:

> "The reason was I felt that he could not possibly be impartial in view of the fact that during our talk it came out he was a medical school classmate of Dr. Caswell, who was at the transfer proceedings in 1941." (Tr. 26)*

Respondent further testified that his transfer to Dannemora was motivated solely by the desire of the prison authorities to prevent him from making a deposition to the State Board of Regents concerning the encouragement by the Department of Correction and the prison authorities of criminality (Tr. 59). He requested that he be released altogether from custody (Tr. 65A).

Dr. Izaak Gorlicki, a physician and an assistant director at Dannemora, testified on behalf of petitioner Herold.

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* References to the stenographer's page numbers at the hearing before Judge Port will be indicated by the letters "Tr.".

On the basis of four or five interviews with respondent and his entire hospital record, he found no change in respondent's mental condition since his original transfer in 1941. Dr. Gorlicki listed a number of factors in addition to respondent's original charge of "corruption", as indicative of the existence of a paranoid condition. One of these factors was the accusations in the petition presented to the District Court and written by respondent (Tr. 83). Another was the fact that respondent had alleged that so many different people were persecuting him, and that this feeling had spread to include virtually all the people with whom respondent was in contact (Tr. 85). He cited a recent example:

> ". . . I asked about the hearing [before Justice Soden] and he said that it was a frameup, that the judge was in league with his own court appointed attorney, his own court appointed psychiatrist. They were all together." (Tr. 86)

It was Dr. Gorlicki's opinion that paranoid characteristics had existed for many years prior to respondent's imprisonment (Tr. 94) and that his suspicions continued as to people with whom he was associated subsequent to 1953 (Tr. 93).

Subsequent to this hearing, on December 8, 1967, Judge Port again dismissed respondent's petition. In his opinion, Judge Port found without merit respondent's claim that the 1941 transfer to Dannemora State Hospital was void because it denied him due process and the equal protection of the laws. The Court held that respondent failed to sustain his burden of proof on the issue of whether his transfer was corruptly motivated and to overcome the presumption of regularity attaching to official acts. The Court adhered to its earlier decision of January 27, 1966 in which it had concluded that an "examination of the record of that [State] hearing discloses the rights of the

[respondent] were amply protected by the court," the respondent having been afforded to full and fair hearing compatible with the requirements of *Townsend* v. *Sain*, 372 U. S. 293 (1963).

As for respondent's reliance on *Baxstrom* v. *Herold*, 383 U. S. 107 (1966) and *In Re Gault*, 387 U. S. 1 (1967), the Court concluded that they were factually distinguishable. Baxstrom was committed under procedures applicable only to prisoners when he in fact was no longer a prisoner. Respondent's transfer was accomplished in the same manner applied to all other prisoners. Gault was convicted, in effect, of a criminal charge without the normal procedural safeguards attendant upon such a proceeding. Respondent received all these safeguards at the time of his trial and subsequent conviction.

The Court also disposed of respondent's cruel and unusual punishment claim, concluding that the Eighth Amendment prohibition was not violated where "relator's [respondent's] condition was so 'deeply rooted' that it would not respond to treatment". Finally, the Court held that New York is not obliged to apply retroactively the new and more stringent requirement of § 383 providing for a judicial hearing.

B.

On December 13, 1967 respondent filed a notice of appeal to the United States Court of Appeals for the Second Circuit. On February 7, 1968 he requested that his Court assigned attorney Faith Seidenberg be replaced. In his petition respondent alleged:

> "Attorney Seidenberg in addition to ignoring relator's numerous requests for aforementioned papers, did not notify him of the court's decision in his case, did not send him a copy of said decision, did not advise him of appeal being taken, and did not send him copies of a number of important documents included in said Index, which he had neither seen nor heard of.

> Attorney Seidenberg, in short, has systematically excluded relator from any and all knowledge of proceedings subsequent to the Syracuse, New York hearing of July 12, 1967."

This motion was denied by the Court below on March 12, 1968 but respondent was given permission to submit his own *pro se* supplemental brief.

On April 24, 1969 the Court below rendered its decision, reversing the decision of the United States District Court and remanding the case back to the District Court for a hearing on the application for habeas corpus, unless a hearing is held in the State courts determining the issues under the standards set forth in the opinion of the Court of Appeals within 60 days from the date of issuance of the mandate.

The Court below found that "at no time during the course of his several state and federal actions has the question of Schuster's sanity adequately been determined" (Appendix A, p. 3a). The 1963 State habeas corpus hearing was regarded as inadequate, the Court holding:

> "Only one doctor testified, and he was a man in whom Schuster placed no trust." (Appendix A, p. 26a)

The Court rejected petitioner's argument that transfer of a prisoner who became mentally ill to a hospital under the auspices of the Department of Correction is an administrative matter, finding that the transfer "significantly increased the restraints upon [respondent]. . . ." The Court cited in an appendix a *pro se* petition by a patient in a Massachusetts mental hospital alleging 35 differences between confinement at this Massachusetts institution and the State Prison at Walpole, Massachusetts. The Court concluded that ". . . by its very nature, confinement at an institution for the mentally insane is far more restrictive than a prison" (p. 16a). It found that under this

Court's decision in *Baxstrom* v. *Herold,* 383 U. S. 107 (1966), any disparity existing between the procedural rights afforded prisoners and those extending to non-prisoners would violate the fundamental requirement of equal protection (Appendix A, p. 24a). It was further held that before a prisoner may be transferred to Dannemora, he must have substantially the same procedures as civilians admitted to a mental hospital, including jury trial and periodic review of the need for continued commitment in a mental institution.

Reasons for Allowance of Writ

1. The decision below constitutes a significant departure from the prior decisions of this Court.

A.

In ruling that a State prisoner serving a sentence for murder cannot be hospitalized for mental illness except through the same procedures accorded to civilians who are detained as mentally ill, the Court below contravened this Court's well-established doctrine that "equal protection [of the laws] does not require identity of treatment." *Walters* v. *City of St. Louis,* 347 U. S. 231, 237 (1954). As this Court said in *McGowan* v. *Maryland,* 366 U. S. 420, 425 (1961):

> "The standard under which [equal protection] is to be evaluated has been set forth many times by this Court. Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if classification rests on grounds wholly irrelevant to the achievement of the State's objective."

See in accord *Lindsley* v. *Natural Carbonic Gas Company*, 220 U. S. 61, 78-79 (1911); *Two Guys From Harrison-Allentown, Inc.* v. *McGinley*, 366 U. S. 582, 591-592; (1961); *Allied Stores of Ohio Inc.* v. *Bowers*, 358 U. S. 522, 528 (1959); *Railway Express Agency, Inc.* v. *New York*, 336 U. S. 106, 110 (1949); *McLaughlin* v. *Florida*, 379 U. S. 184, 191 (1964); 82 Harv. L. Rev. 1065, 1076-1132 (1968); 116 Pa. L. Rev. 924, 930 (1968).

The result of this erroneous decision is to place in doubt not only the validity of New York's procedure, but also of administrative transfers of prisoners under federal law (see 18 USC § 4241) and under other state statutes. See e.g., *Darey* v. *Sandritter*, 355 F. 2d 23 (9th Cir. 1965); *U. S. ex rel. Gapinski* v. *Ragen*, 152 F. 2d 268 (7th Cir. 1945).

It is in no sense arbitrary to differentiate between those whose detention results from a valid criminal conviction, and someone whose life is interrupted solely by virtue of a determination that he is mentally ill and therefore should be treated in an institutional setting. *Cf. Price* v. *Johnston*, 334 U. S. 266 (1948). While a prisoner fully retains his right to fair treatment, *cf. Wright* v. *McMann*, 387 F. 2d 514 (2nd Cir., 1967), is is equally clear that this treatment need not be identical to that of members of society at large. This Court noted in *Goesaert* v. *Cleary*, 335 U. S. 464, 466 (1948):

> "The Constitution . . . precludes irrational [legislative] discrimination as between persons or groups of persons . . . but the Constitution does not require situations which are different in fact . . . to be treated in law as though they were the same."

Respondent Schuster had been transferred to Dannemora State Hospital from Clinton Prison on September 9, 1941 pursuant to § 383 of the Correction Law of New York as it then read (Appendix B *infra* at p. 45a). As he testified

at the hearing before the District Court (Tr. 14), he had been examined by Dr. Leaman Caswell, a Clinton Prison physician and Dr. Schwartz, a physician at the Dannemora State Hospital (Tr. 14). The transfer was then ordered by the Warden of Clinton Prison upon a certificate of lunacy signed and verified by Dr. Caswell. On October 9, 1941 respondent appeared before a meeting of the medical staff of Dannemora for diagnosis. The five doctors present unanimously agreed that respondent was suffering from a paranoid condition.

Under §§ 72-74 of the Mental Hygiene Law of New York at that time, civil patients detained solely on the grounds of mental illness had a judicial commitment procedure rather than the medical and administrative procedure provided in § 383 of the Correction Law.

None of the cases cited by the Court below support its sweeping conclusion that Schuster's transfer was violative of the Constitution because the procedure on which it was based differed from that applicable to civil patients. The holding in *Baxtrom* v. *Herold*, 383 U. S. 107 (1966) held invalid

> "... the statutory procedure under which a prisoner may be civilly committed on the expiration of his penal sentence without the judicial review available to all other persons civilly committed in New York." (383 U. S. at 110.)

Throughout this Court's decision, it is emphasized that Baxtrom's was a civil commitment and that upon expiration of his sentence he would be a civilian and must be treated as such. Respondent in the instant case, on the other hand, is a convicted murderer serving a long term sentence. Clearly he is distinguishable from Baxtrom; his rights include all privileges available to others similarly incarcerated in prison as a result of a conviction of a crime.

Nor is the recent decision of the New York Court of Appeals in *People* v. *Fuller,* —— N. Y. 2d —— [decided April 11, 1969] relevant to the instant case. There the Court held that convicted prisoners who were found to be narcotics addicts are entitled to a jury trial on the issue of addiction. However, the Court made clear that the basis for its finding was that such an addict was subject to a magnified period of detention as a result of his illness:

> ". . . [I]f the substantive crime committed is a misdemeanor, the state has a right to deprive the defendant of his freedom for a period of only one year, not three years. After one year he is entitled to be given his freedom. The justification for the loss of liberty for periods beyond the maximum authorized sentence for the crime must, therefore, rest on some other basis, its civil or non-punitive aspect. If so, the proceeding does not differ from purely civil commitment proceedings in nature, purpose and effect and the right to jury must obtain."

The Court below also erroneously cites the case of *U. S. ex rel. Carroll* v. *McNeill,* 294 F. 2d 117 (2nd Cir., 1961) in support of its conclusion. In *Carroll,* the statute in question permitted a transfer from a civil mental institution to an institution with stricter security for (1) non-civil patients or (2) civil patients who were previously incarcerated and still manifested "criminal tendencies". The Court found no constitutional defect as to the first group, but as to the second group held that the denial of the judicial transfer procedure arbitrarily discriminated against "those patients who have fully served prior sentences for crime and have subsequently been admitted by civil process to a state institution. . . ." 294 F. 2d at 120.

In *Bolton* v. *Harris,* 395 F. 2d 642 (D. C. Cir. 1968) and *Cameron* v. *Mullin,* 387 F. 2d 193 (D. C. Cir. 1967), petitioners were acquitted by reason of insanity. They were

serving no prison term. Yet they were committed without the protections afforded to others civilly detained.

Specht v. *Patterson*, 386 U. S. 605 (1967) is also inapposite. There petitioner was in effect being charged with a new crime under the Colorado Sex Offenders Act, which carried an indeterminate term of from one day to life. Yet he had been convicted only of the crime of "indecent liberties" providing a maximum sentence of 10 years. This Court cited (383 U. S. at 606) the analogous case of *Gerchman* v. *Maroney*, 355 F. 2d 302, 312 (3rd Cir. 1966) and concluded:

> "Petitioner was therefore entitled to a full judicial hearing before the *magnified sentence* was imposed." (Emphasis added.)

New York has similarly held (see, e.g., *People* v. *Bailey*, 21 N. Y. 2d 588 [1968] that where length of confinement is based on the potential danger posed by the particular individual rather than on the sentence for the crime itself, additional findings as to that individual must be made. However, *Specht* and *Bailey* do not apply where length of sentence relates to the original conviction of crime.

In the case at bar, respondent was transferred from one facility under the aegis of the Department of Correction to another such facility, so that he could receive more specialized care. Such transfers, based upon medical rather than judicial proceedings, have been consistently approved as reasonable and non-discriminatory (as will be more fully set out at Point 2, *infra*). See, e.g., *Darey* v. *Sandritter*, 355 F. 2d 23 (9th Cir., 1965); *Urban* v. *Settle*, 298 F. 2d 592 (8th Cir., 1962); *Roshausen* v. *Steele*, 193 F. 2d 273 (8th Cir., 1951); *U. S. ex rel. Gapinski* v. *Ragen*, 152 F. 2d 268 (7th Cir., 1945). *Cf. U. S. ex rel. Morgan* v. *Wolfe*, 232 F. Supp. 85 (S.D.N.Y. 1964).

However, the Court below held that even though the instant case involves an administrative transfer rather than a civil commitment, the prisoner must be treated like a civil

patient because he is substantially disadvantaged by his removal to a psychiatric facility:

> "In view of the substantial deprivations, hardships and indignities such a move may produce, judicial scrutiny is necessary to ensure that the procedures preceding the transfer adequately safeguard the fundamental rights of the prisoner." (Appendix A *infra* at p. 17a.)

As a basis for this conclusion, the Court cites (and appends to its opinion) a *pro se* petition by a mental patient in a Massachusetts Mental Hospital alleging 35 differences between confinement at this Massachusetts institution and the State Prison at Walpole.

The Court's remarks on this subject bear no relation to the realities concerning Clinton and Dannemora.

Confinement in Dannemora State Hospital is considerably less restrictive than at Clinton State Prison. There are no cells in the hospital; rooms are larger and dormitories and wards predominate. Visiting rights are liberal and during such visits, there is no separation by screens or barriers and no attendant present within hearing distance. There is no searching of patients before or after visits. There are no guns or night sticks carried by personnel and no compulsory labor.

Nor is the approach at the Hospital merely custodial. Under the Hospital Improvement Program, which is federally funded by the U. S. Department of Health, Education and Welfare at the level of $100,000 a year over a three-year period and staffed by professional consultants from the Department of Psychiatry and Psychology from the University of Vermont, considerable attention is given to active treatment and therapy programs. These programs include the use of a therapeutic community in which patients are organized into a patient government; group

counselling; and a broad range of occupational therapy including school and music programs, individual hobbies and recreation. The Hospital Improvement Program is administered and supervised by the New York State Department of Correction and the New York State Department of Mental Hygiene.

The use by the Court below of the word "languishing" with respect to respondent Schuster (App. A, p. 16a) is completely inappropriate in view of established hospital procedures. Patients on all wards are observed daily by the charge officer assigned to the wards. These officers make daily notes describing the behavior of the patient which are given to the doctor assigned to the ward. This doctor himself makes daily rounds and interviews any patient with special problems. Respondent Schuster's ward has an average of 20 to 25 patients and the ward doctor has an opportunity to speak with each patient on his daily rounds. In addition, a weekly staff conference held with all ward doctors is purposed to report to the administration any patients who appear to be improved, or have recovered from their mental illness.

The yearly rate of discharges from Dannemora State Hospital is approximately 130 to 150 per year. The total patient census averages between 415 and 425; thus, the proportion of discharge is quite substantial.

In addition to the medical services and individual attention available at Dannemora State Hospital, it is also interesting to note that a per capita cost analysis shows a much greater expenditure per patient than the similar per capita cost statement for Clinton Prison. See Appendix E, *infra*.

It is clear, in view of these facts, that Schuster has not been deprived of equal protection of the laws by virtue of his transfer to Dannemora. He is subject to less re-

straint, less obligation, less institutional atmosphere than pursuant to confinement at Clinton.

The decision below makes a further attempt to differentiate Schuster's status as a patient at Dannemora by pointing out that the mentally ill are not generally paroled.

Section 213 of the New York Correction Law provides in part:

> "Discretionary release on parole shall not be granted merely as a reward for good conduct or efficient performance of duties . . . but only if the board of parole is of opinion that there is reasonable probability that, if such person is released, he will live and remain at liberty without violating the law, and that his release is not incompatible with the welfare of society. . . ."

A person who has been convicted of a crime has no constitutional right to parole. The conditions governing parole are statutory and legislatively imposed. *Matter of Briguglio* v. *Board of Parole,* 24 N. Y. 2d 21 (1969); *Escoe* v. *Zerbst,* 295 U. S. 490 (1934); *Cook* v. *Willingham,* 389 F. 2d 769 (10th Cir. 1968); *Arketa* v. *Wilson,* 373 F. 2d 582 (9th Cir. 1967).

In New York, under the present statutory scheme, a prisoner is not subject to the supervision of a court. He is "instead under active *administrative* [emphasis in original] supervision of trained officials. . . . The nature and the extent of the examination is solely within the discretion of the administrative board . . . if the system of this State is to be altered, it should be altered by the legislature and not by this court". *Matter of Briguglio, supra* at 28-29. The Federal courts have consistently held that parole hearings do not involve constitutional due process. *Richardson* v. *Rivers,* 335 F. 2d 996 (D. C. 1964); *Dimarco* v. *Greene,* 385 F. 2d 556 (6th Cir., 1966); *Curtis* v. *Bennett,* 351 F. 2d 931 (8th Cir. 1965); *Jones* v. *Rivers,* 338 F. 2d

862 (4th Cir. 1964); *Carson* v. *Executive Dir.*, 292 F. 2d 931 (10th Cir. 1965).

Thus, even if the Parole Board holds no further hearings for Schuster, this does not constitute an impairment of a constitutional right. A statutory denial of probation is not a denial of equal protection or a cruel and unusual punishment as contrasted with prisoners who have such a right. *Sperling* v. *Willingham*, 353 F. 2d 6 (7th Cir. 1965) [Denial of probation to persons convicted of narcotics violations]. Furthermore, the Parole Board has authority to parole Schuster directly from Dannemora, 1944 Opp. Att. Gen. 117.

The Court below therefore lacked both a factual and a legal basis for concluding that respondent's transfer denied him the equal protection of the laws.

B.

Respondent's counsel also argued that Schuster's transfer under the old § 383 of the Correction Law violated due process standards. The statute required the certificate of one physician; however, Schuster was examined by two doctors prior to his transfer and five doctors the month following his arrival at Dannemora (See p. 4 *infra*). Their unanimous opinion that he was a paranoid demonstrates that his hospitalization was a reasonable action taken to protect him and was based upon objective medical conclusions.

It should be noted that 18 U.S.C. § 4241 provides for administrative transfers from Federal correctional institutions to Federal mental institutions. A board of examiners for each such institution, consisting of three persons, examines inmates alleged to be insane and reports to the Attorney General of the United States. The Attorney General may then direct the warden to hospitalize the prisoner until "in the judgment of the superintendent of said hopsital" the prisoner should be restored to sanity or until the maximum sentence "without deduction for

good time or commutation of sentence, shall have been served."

18 U.S.C. §§ 4244 and 4245, dealing with problems of mental competency to stand trial and mental illness with respect to lack of responsibility for the commission of a crime, both provide for judicial hearings. Thus Federal law makes a differentiation between treatment of those convicted of crime who are transferred through administrative process, and those who have not yet been convicted or who are not responsible for their crime.

Moreover, respondent had a full and fair hearing in New York Supreme Court, Clinton County, commencing on May 11, 1963, showing the need for his confinement in a mental institution rather than in a prison. At this hearing he was represented by counsel and was examined by an independent physician, Dr. William Carson, who stated that in his opinion respondent was mentally ill with a paranoid condition and should not be transferred back to the general prison population. The basis for this diagnosis is set out fully at p. 6, *infra*.

In addition, pursuant to the remand of the United States Court of Appeals for the Second Circuit, respondent received a hearing in the United States District Court for the Northern District on the issue of whether his initial transfer was "corruptly motivated". At this hearing respondent testified that while at Clinton Prison he had sent a letter for the purpose of obtaining the services of a lawyer to present to the Board of Regents a deposition concerning "criminal activities in the prison school which were in effect sponsored by the civilian in charge of the school" (Tr. 15). He further testified that because of this letter he was brought before two doctors (Tr. 14) who attempted to persuade him to withdraw the deposition, and that he was transferred to the hospital to suppress the ultimate sending of this deposition.

Dr. Izaak Gorlicki, a physician and Assistant Director at Dannemora, was called by the State and he testified as

to the deeply rooted paranoid condition of respondent. He based this conclusion on a number of factors in addition to respondent's original charges of "corruption". One of these factors were the accusations in respondent's *pro se* petition. Another was the fact that respondent had alleged that so many different people were persecuting him and that this feeling had spread to include virtually all those with whom respondent was in contact:

> ". . . I asked about the hearing [before Justice Soden] and he said that it was a frameup, that the judge was in league with his own court appointed attorney, his own court appointed psychiatrist. They were all together." (Tr. 86)

After this testimony, supplemented by the testimony from the state hearing, the District Court reasonably concluded that petitioner's transfer was not corruptly motivated; rather the court held that he was transferred because he was mentally ill and still is at the present time. It is clear that this finding is not erroneous and is supported by the record. Federal Rules of Civil Procedure, Rule 52.

Thus respondent had two hearings at which two doctors, the independent psychiatrist appointed by the state court and the assistant director at Dannemora representing the State hospital, testified that his hospitalization was proper. Even assuming *arguendo* that respondent has made out any constitutional case for a hearing, due process standards have been met. *Townsend* v. *Sain,* 372 U. S. 293 (1963); 28 United States Code § 2254; *U. S. ex rel. Rizzi* v. *Follette,* 367 F. 2d 559 (2d Cir. 1966); *United States ex rel. Abair* v. *Wilkins,* 333 F. 2d 742, 743-744 (2d Cir., 1964), *cert. denied,* 379 U. S. 977.

In *Abair,* petitioner challenged an earlier conviction which was the basis of his sentence as a recidivist. This conviction had been without counsel. However, he had

later brought a state *coram nobis* proceeding in which all the issues then were litigated with counsel. Thus he had a full and fair hearing which is all that is required under *Townsend* v. *Sain, supra.*

The decision below in the instant case dismissed Schuster's two hearings:

> "At no time during the course of his several state and federal actions has the question of Schuster's sanity adequately been determined." (Appendix A *infra* at p. 3a).

The Court concluded that the 1963 state hearing was inadequate, since the psychiatrist who testified was "a man in whom Schuster placed no trust" (Appendix A *infra* at p. 26a). The Court added that the doctor was "unmoved by Schuster's claim, which the State did not deny, that the prison Warden, Chief Clerk and Comptroller had been dismissed shortly after Schuster made his charges of corruption [in 1941]" (Appendix A, p. 10a). The Court was erroneous in implying that the State did not deny Schuster's claims of "corruption". As to the three persons accused by Schuster, none were dismissed. Warden Walter Martin, M.D., was transferred to Attica prison at his own request on July 1, 1943. Harold A. Davis, Head Teacher, retired on January 16, 1946. Warren R. Frenette, Comptroller's Clerk, appointed June 1, 1936, remained until July 1, 1939, when the position was abolished in all Correctional Institutions. Chief Clerk John R. Cain, succeeding to the post in 1939 after the resignation of Francis Murphy, held the position until he was appointed Deputy Commissioner of Correction on March 1, 1959.

Analysis of the record shows that respondent has always exhibited paranoid characteristics. He not only complained of persecution in respect to his transfer from Clinton, but also in respect to his transfer from Sing Sing to

Attica and from Attica to Clinton (Appendix C *infra*). Indeed respondent's own recent brief to the Court below, which is reprinted in part as Appendix C, contains pages of accusations and delusions which clearly indicate his present paranoia.

The paranoid patient often suffers no deterioration of personal or mental faculties; however, he remains convinced that he is the center of other peoples' schemes and that everything that happens to him is a result of these schemes. Resort to violence on his part is justified by the persecution which his enemies are visiting upon him. Everything around him is related to the evil of others which is contrasted to the paranoid's conception of his own innocence. The description of this mental disease by an eminent authority on the subject is included herein as Appendix D; a reading of this analysis together with Schuster's brief at Appendix C, indicates that it closely fits Schuster's actions from the time he committed murder until the present day. This material also underlines the sad fact that paranoia is virtually incurable by present methods of psychiatric treatment.

The Court below repeatedly asserts that respondent does not "need the mere custodial care with which the institution provides him" and that "it is conceded he does not need purely custodial detention in a mental hospital" (Appendix A *infra* at pp. 31a, 33a). There is absolutely no basis in the record, or outside of it, for this statement. Respondent does need hospital care and that is the sole reason why he should remain at Dannemora rather than in Clinton Prison. The case of *Rouse* v. *Cameron*, 373 F. 2d 451 (D. C. Cir. 1966), cited by the decision below, is not at all apposite to the conclusion that respondent should be transferred because of the difficulty in treating paranoia. In *Rouse* the petitioner had been acquitted of a crime by reason of insanity. Thus the only basis for his commitment and detention was treatment, not punishment. Here,

respondent is confined because he was convicted of murder in the second degree.

It is a well-established principle that the Federal courts do not sit as tribunals of review over state determinations concerning questions of sanity. *Nelson* v. *Sandritter,* 351 F. 2d 254 (9th Cir. 1965); *U. S. ex rel. Morgan* v. *Wolfe,* 232 F. Supp. 85, 94 (S.D.N.Y. 1964) and cases cited therein. In the instant case the Court has done so despite substantial evidence supporting the conclusion of the New York courts, and despite the availability of habeas corpus in New York to test question of sanity at any time. *Brown* v. *Johnston,* 9 N. Y. 2d 482 (1961).

Indeed, the decision below concedes that the New York Courts have protected and implemented the rights of those convicted of crime who suffer from a mental illness (Appendix A, pp. 32a, 21a). See e.g., *People* v. *Kaganovitch* v. *Wilkins,* 23 App. Div. 2d 178, 259 N.Y.S. 2d 462 (4th Dept. 1965); *People* v. *Jackson,* 20 App. Div. 2d 170, 245 N.Y.S. 2d 534 (3rd Dept. 1963).

C.

The dissenting opinion below expresses particular concern "with a trend towards judicial legislation by the federal courts" (Appendix A *infra* at p. 38a). The majority opinion has not only relied upon procedures no longer in existence in respect to a prisoner who has had several full and fair hearings on the questions which he raised, but has also invalidated the present § 383 of the Correction Law (McKinney's 1968 Supp.) which was not before the Court:

> "We believe, as we have already indicated, that implicit in *Baxtrom* v. *Herold* is the principle that such disparity as exists even under the present statutes between the procedural rights afforded prisoners and those extending to non-prisoners violates equal protection." (Appendix A *infra* at p. 24a).

Section 383 of the Correction Law now provides that prisoners to be transferred to Dannemora must be given an examination by two independent physicians and on appropriate notice a hearing at which the prisoner may introduce evidence and cross-examine; judicial approval must also be secured.

The difference between this statute and §§ 72-74 and 88 of the Mental Hygiene Law (Appendix B *infra* at pp. 51a-56a) is that the Mental Hygiene Law (1) requires periodic judicial review of the need for further institutionalization, (2) the availability of the Mental Health Information Service and (3) a *de novo* review of the issue of sanity by jury. Application of these civil provisions to those under the supervision of the Department of Correction would affect hundreds of prisoners in New York State.*

The rewriting of New York statutes which has in effect occurred by virtue of this ruling, was so specific that it caused the dissenting judge to note:

> "About all that is lacking in such a decree is the number of the cell [respondent] is to occupy temporarily and the direction to the State Parole Board that they convene and release him at once." (Appendix A *infra* at p. 43a)

Thus the instant decision is an unfortunate example of the kind of ruling proscribed by this Court in *Ferguson v. Skrupa*, 372 U. S. 726, 730, where it was held:

> "Legislative bodies have broad scope to experiment with economic problems, and this court does not sit to 'subject the state to an intolerable supervision hostile to the basic principles of our government and

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* It is interesting to note that between 40 and 50 requests for jury trials pursuant to this decision have already been received from patients in Dannemora in the one month following the decision below.

> wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to secure'."

See in accord *Seagram* v. *Hostetter,* 384 U. S. 35, 47 (1966).

2. The decision below conflicts with the law in four other circuits.

The decision below is in direct conflict with the law of the Seventh, Eighth, Ninth and District of Columbia Circuit Courts of Appeal, and thus creates judicial confusion as to the authority of the government to transfer prisoners to institutions equipped to give psychiatric care, by means of statutes which comport with due process but which are not identical to provisions relating to civil patients.

In *Darey* v. *Sandritter,* 355 F. 2d 23 (9th Cir. 1965), a prisoner was administratively transferred to a state hospital pursuant to § 2684 of the California Penal Code. Appellant argued that he was entitled to a judicial determination as to his sanity. The Court rejected this argument holding:

> "It is not appellant's hospitalization which deprives him of his liberty. The deprivation stems from the judgment of conviction and the sentence of confinement. The hospitalization does not result from a separate order or judgment which is independent of the penal judgment and might *extend a legally imposed term of restraint.* Whether a prisoner, during his lawful term, should or should not receive medical treatment in suitable environments must ordinarily be determined by custodial authorities in the proper exercise of a sound discretion." (355 F. 2d at 23). (Emphasis added)

The Court concluded: "Appellant makes no case for federal intervention." (355 F. 2d at 23).

The law of the Eighth Circuit has long been in accord with these principles. As the Court said in *Jones* v. *Pescor*, 169 F. 2d 853 (8th Cir. 1948), in relation to an administrative transfer to the United States Medical Center for defective delinquents under 18 U.S.C. § 4241:

> "And again, we have said that Congress undeniably has the power to make such provision for the medical care and treatment of federal prisoners and to set up such administrative machinery for determining a prisoner's need for care and treatment and the nature thereof, without the right to a formal hearing, as it deems advisable."

See, in accord; *Garcia* v. *Steel*, 193 F. 2d 276 (8th Cir. 1951); *Rosheisen* v. *Steel*, 193 F. 2d 273 (8th Cir. 1951); *Urban* v. *Settle*, 298 F. 2d 592 (8th Cir. 1962).

Similarly, the Seventh Circuit has ruled in relation to an Illinois statute that the transfer of a prisoner to a mental hospital, when effectuated during the course of his sentence, is an administrative function to be accomplished pursuant to statute. *United States ex rel. Gapinski* v. *Ragen*, 152 F. 2d 268 (7th Cir. 1945).

A recent decision by the District of Columbia Circuit Court of Appeals with respect to 18 U.S.C. 4241 also upholds the administrative procedure as constitutionally proper. *Carter* v. *United States*, 283 F. 2d 200 (D. C. Cir. 1960).

These Circuit Court decisions have sustained state and federal transfers of prisoners which are based on medical rather than judicial conclusions, and found that they are not arbitrary. *Darey* v. *Sandritter, supra.* The Court below in the instant case, however, did not analyze the procedure under former § 383 of the Correction Law in due process terms. Indeed, it did not find that § 383 of the Correction Law of New York, either its old or its new form, is arbitrary in itself. Instead, it held that the pro-

cedure becomes arbitrary solely because of a differentiation between *transfer* procedures as to prisoners and *commitment* procedures as to civilians.

It is respectfully submitted that this holding is a completely unsupported departure from this Court's careful definitions of equal protection of the law, and an unwarranted invalidation of state statutes which are in harmony with federal constitutional standards.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Dated: New York, New York, June 5, 1969.

Respectfully submitted,

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APPENDIX

APPENDIX A—Decision of the United States Court of Appeals for the Second Circuit.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 434—September Term, 1968.

(Argued March 12, 1969 Decided April 24, 1969.)

Docket No. 32194

UNITED STATES OF AMERICA *ex rel.* ROY SCHUSTER,

Relator-Appellant,

—v.—

Ross E. HEROLD, M.D., Director of Dannemora State Hospital, Dannemora, New York,

Respondent-Appellee.

Before:

MOORE, KAUFMAN and FEINBERG,

Circuit Judges.

Appeal from an order of the United States District Court for the Northern District of New York, Port, *J.*, denying appellant's petition for a writ of habeas corpus which challenged the legality of his transfer from Clinton Prison to Dannemora State Hospital.

Reversed and remanded.

FAITH A. SEIDENBERG, GEORGE J. ALEXANDER, Syracuse, N. Y., *for relator-appellant.*

Appendix A.

ARLENE R. SILVERMAN, New York, N. Y. (Louis J. Lefkowitz, Attorney General for the State of New York, and Samuel A. Hirshowitz, First Assistant Attorney General, on the brief), *for respondent-appellee.*

KAUFMAN, *Circuit Judge:*

We have, thankfully, come a long way from the days when ignorance induced fear of the mentally ill. As great strides in psychiatric knowledge have been paralleled by evolving concepts of due process, humane procedures for the commitment and treatment of the mentally ill have replaced snake pits and witch hunts. The time has long since passed when a mere charge that one was "possessed by demons" would automatically result in banishment for insanity.

Petitioner's allegations in this proceeding must be weighed against this background of gradual development. These allegations, which are in the main uncontested, may be briefly summarized: In 1941, while incarcerated in Clinton State Prison, Roy Schuster expressed his belief in the existence of "corruption" in the prison administration. Shortly thereafter, solely on the strength of a prison doctor's finding that Schuster's charges evidenced "the paranoid idea that members of the [prison] personnel are against him," Schuster was transferred from Clinton to Dannemora State Hospital for the Criminally Insane. In accordance with New York law as it then stood, Schuster was afforded no meaningful hearing on the issue of his sanity, was not permitted the assistance of counsel, was given no opportunity to call his own witnesses, was given no advance notice of the nature of the transfer proceedings, and was transferred to Dannemora within twenty-four hours after he was first seen by the prison doctor.

Appendix A.

Despite repeated attempts to void the transfer in both state and federal courts, Schuster remains in Dannemora, more than twenty years after he would have been eligible for parole had he not been transferred from Clinton. His petition was dismissed on December 8, 1967 by Judge Port below, after a hearing primarily devoted to the validity of Schuster's charges of prison corruption. At no time during the course of his several state and federal actions has the question of Schuster's sanity adequately been determined.

For the reasons we shall set forth, we believe that before a prisoner may be transferred to a state institution for insane criminals, he must be afforded substantially the same procedural safeguards as are provided in civil commitment proceedings, including proper examination, a hearing upon notice, periodic review of the need for commitment, and trial by jury. If these procedures result in a determination that Roy Schuster is sane, he should be returned to Clinton Prison, where he will be eligible for parole. As an observer has recently noted, those "twice cursed"—as criminal and as mentally ill—should not be "punished" for the "crime" of becoming mentally sick while serving a prison sentence. Morris, The Confusion of Confinement Syndrome: An Analysis of the Confinement of Mentally Ill Criminals and Ex-Criminals by the Department of Correction of the State of New York, 17 Buff. L. Rev. 651 (1968). [hereinafter cited as Morris].

I.

Schuster's Crime and Trial

During the 1920's, Roy Schuster was a successful tap-dancer, performing in theaters across the nation. His earnings were considerable by the standards of the day, reaching over $200 a week. On one tour through Milwaukee,

Schuster, then 22, met a girl, fell in love, and after a brief courtship agreed to marry her, although he later insisted that she was pregnant by another man at the time. At his wife's inducement, he abandoned the stage and settled down to raise a family. Accordingly, Schuster became a dance instructor at Ned Wayburn's dancing school at a substantially diminished salary. Being industrious, however, he was able to increase his weekly income to approximately $150.

Then came the Depression. Schuster's income was cut to $75 and then cut again and again to as little as $11 a week. As the creditors closed in, the romance evaporated. Schuster and his wife quarreled frequently and he even accused her of adultery and neglect of their daughter Coleen, then three years of age. The two separated, reconciled, and separated again. Schuster became so upset when the formal separation action was commenced that he attempted suicide. Mrs. Schuster responded to his distress by securing a court order directing Schuster to pay a fixed sum for the support of his family. Soon he found the payments burdensome and difficult to meet in those lean days. But Amy Schuster pressed for her payments In settlement discussions she insisted that she would take no less than $40 a week, no matter how little Schuster was earning.

Finally, Mrs. Schuster threatened to have her husband jailed for contempt of court if he did not pay. Faced with this equivalent of the debtor's prison, Schuster became more distraught. He pleaded with his wife that if she went ahead with her plan, he would lose the small dance studio he had just opened and be irrevocably ruined with no benefit to anyone. During the course of settlement dis-

cussions the acrimony mounted and Schuster threatened suicide on several occasions. Finally, Amy agreed to meet him one morning to discuss the securing of the contempt order in front of 51 Chambers Street, New York where both Amy's and Roy's lawyers maintained offices.

Schuster and his wife met as planned. They went first to his lawyer's office but he was not in. They then proceeded to her lawyer's office. Schuster allegedly pleaded with Amy's lawyer, "Will you please give me a chance, let me explain the situation? Let me prove to you I have no money. If you put me in jail Monday, you will put me out of business. You will destroy my future, you will make me commit suicide." With that tragic peroration he drew a 32. caliber revolver from his pocket. Bedlam ensued and in the chaos Schuster fired several shots wounding her lawyer and killing his wife.

Subsequently, Schuster was indicted for murder in the first degree. His defense was that he had carried the revolver with the intention of committing suicide. He insisted that his wife's lawyer lunged for the gun when Schuster drew it from his pocket and that at the moment Schuster was in a state of "panic" and was not aware of what was happening. The gun, according to his testimony at the trial, somehow was discharged in all the excitement.

To rebut the claim of "panic" the state introduced expert evidence that Schuster was not suffering from any mental disease. The state's psychiatric expert, Dr. Perry M. Lichtenstein, then Resident Physician at the City Prison, denied repeatedly that Schuster was suffering from any form of delusion or mental disease. After a trial lasting one week, a jury found Schuster guilty of murder in the second degree. On November 2, 1931, Schuster, then 27 years old, was sentenced to a term of from twenty-five years to life.

Appendix A.

A. *Schuster's Imprisonment*

Schuster was sent first to Sing Sing and then transferred in 1935 to Clinton State Prison. There he made a good adjustment. He taught a "cell-study" course leading to a high school equivalency degree, and even received a letter from the New York State Board of Education commending him for his work. In the normal course of events, Schuster might have expected to serve his time and to be eligible for parole in 1948, when he was still not too old to build a new life. But, in 1941, life took another wrong turn for him. Schuster became convinced of corruption in the prison, particularly on the part of the official in charge of the prison education program. His expression of this belief led to his transfer to Dannemora State Hospital for the Criminally Insane. Although Schuster charges that the state "buried him alive" in Dannemora to prevent him from bringing the corruption to light, the district court was unconvinced the transfer was corruptly motivated. The state contends that there was no corruption, that Schuster was and is a "paranoid" and that his insistence upon the existence of a scandal is prime evidence of his delusion.

Schuster entered Dannemora on September 9, 1941, at the age of 37. Now 64 years old, he still languishes there.

Schuster's transfer to Dannemora accorded with the provisions of § 383 of the New York Correction Law as it then read.[1] That section provided for automatic transfer upon

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[1] New York Correction Law § 383 then read:

"TRANSFER OF PRISONERS IN STATE PRISONS, REFORMATORIES AND PENITENTIARIES AND IN THE INSTITUTION FOR MALE DEFECTIVE DELINQUENTS TO DANNEMORA STATE HOSPITAL.—Whenever the physician or the psychiatrist of any one of the state prisons, reformatories or penitentiaries or of the institution for male defective delinquents shall certify to the warden or

(*footnote continued on following page*)

the certification of a single prison doctor that the prisoner was "in his opinion insane." Schuster's commitment certificate, signed by Leaman H. Caswell, M.D., the physician at Clinton Prison, whose qualifications in psychiatry we are unable to determine from the record before us, sketchily summarized his single conversation with the prisoner, and went on to remark with breathtaking simplicity: "He was circumstantial in his conversation, very talkative, complained bitterly. He was paranoid and suspicious. * * * This man was reported for writing letters regarding cowardly attacks made against him by the personnel and requested that something be done about it. In his letters he has shown the paranoid idea that members of the personnel are against him." Dr. Caswell attempted no further diagnosis of Schuster's condition except for the understandable observation that the prisoner was "depressed." Although the certificate explicitly requested information as to whether the patient was "violent, dangerous, destructive, excited, . . . homicidal or suicidal," Dr. Caswell did not indicate Schuster exhibited any of these symptoms.

(*footnote continued from previous page*)

superintendent thereof, that a male prisoner confined therein and sentenced or committed thereto for a felony, is, in his opinion, insane, such warden or superintendent shall cause such prisoner to be transferred to the Dannemora State Hospital and delivered to the medical superintendent thereof. Such superintendent shall receive the prisoner into such hospital, and retain him there until legally discharged. The warden or superintendent, before transferring such insane prisoner, shall see that he is in a state of bodily cleanliness, and is provided with a new suit of clothing similar to that furnished to prisoners on their discharge from prison. At the time of such transfer, there shall be transmitted to the superintendent of such hospital the original certificate of conviction and the certificate of insanity executed by the physician or psychiatrist, which shall be filed in the office of such superintendent who shall file a notice of such transfer in the office of the department of correction."

Appendix A.

B. *Hearing in the District Court*

At the hearing before Judge Port, Schuster testified that in 1941 he met with two doctors, Dr. Caswell and a physician from Dannemora State Hospital for what appears to be a very brief period. Schuster had no warning that the interview was to determine his sanity. He testified that the two doctors devoted most of their "diagnostic" efforts to persuading him to recant his charges. This conversation was the only "hearing" Schuster received. At no time was he afforded an opportunity to cross-examine the doctors or to present evidence of any kind to contradict the "diagnosis" of these two prison doctors, neither of whom so far as we know, had any expertise in psychiatry. And at its conclusion, he testified, he was told to sign a twelve page transcript of the proceeding without being permitted to read its contents.[2] Schuster was not represented by counsel during the proceedings, although he requested an adjournment to secure legal assistance. There is nothing in the record before us which indicates the doctor from Dannemora ever expressed any opinion on Schuster's commitment.

As indicated, Schuster would have become eligible for parole in 1948, had he remained in Clinton. His present situation is far different; the district court judge observed that the present policy of the Parole Board appears to preclude the possibility of parole for any prisoner as long as he is in Dannemora Hospital. Schuster had a perfunctory hearing on the question of parole in 1948, but apparently no further action has been taken since that date.[3]

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[2] This transcript was not found in petitioner's file, nor was its existence ascertained at the hearing below.

[3] While theoretically, the Parole Board has authority to parole Schuster directly from Dannemora, 1944 Op. Att. Gen. 117, in practice the Board does not parole anyone who is incarcerated in a mental institution for the presumption is that he is mentally ill.

Appendix A.

It is of some interest that Judge Port expressly noted that at Dannemora Schuster had received no medication or treatment other than infrequent interviews with a staff doctor. The reason for this apparent neglect according to Dr. Izaak Gorlicki, assistant director of Dannemora, is that Schuster's paranoia is so "deeply rooted" that it would not respond to therapy. Moreover, Schuster has not been assigned to any work duty. When Schuster was asked by Judge Port if he did any work "up there," he explained, "Not now. I did for a while. I was librarian, but other than that, I study in my spare time and things like that to try and prepare for an honorable rehabilitation so that when I was released I wouldn't step out cold, I would be able to step into an honorable job . . ."

It is to be noted that there is general agreement that Schuster is not in need of custodial detention. At the hearing below, Dr. Gorlicki characterized his behavior at the hospital as "Very quiet. Cooperative. Has never been any problem in management. He has never been insulting to anyone." Asked on cross-examination if Schuster was being confined as criminally insane because of misbehavior, the Doctor replied "No, he behaves good [*sic*]. As a matter of fact he is a very useful person. He is isolated from the hospital and he keeps to himself, and seldom converses with the officers. He never makes any request unless he needs something."

From this testimony we are forced to the unhappy conclusion that Schuster is simply a forgotten man in a mental institution which has nothing to offer him. He receives no treatment, is not occupied in therapy of any kind, he appears not to be in need of the Dannemora type of confinement and he is able to keep his equilibrium only through his own efforts and his hope that he is preparing himself for the day when he will be released.

Appendix A.

C. *Petitions for Habeas Corpus*

Since 1948, Schuster has repeatedly challenged his commitment to Dannemora in the New York State courts but in each instance to no avail. His petitions in the state courts for habeas corpus asserting his sanity were dismissed in 1950, 1960 [before the New York courts permitted such a challenge in *People ex rel. Brown* v. *Johnson*, 9 N. Y. 2d 482, 174 N. E. 2d 725, 215 N. Y. S. 2d 44 (1961)] and on October 2, 1962. Another petition, dated December 27, 1962 led to a hearing in a state court in March 1963 at which Schuster was represented by assigned counsel.

At the 1963 state hearing, only one psychiatrist, a Dr. Carson, testified. He admitted that Schuster was "an individual whose conduct in general is correct, who uses impeccable logic" and that "he shows no obvious signs of mental illness such as deterioration, untidiness, hallucinatory experiences, bizarre ideas or bizarre behavior." Nonetheless, Dr. Carson concluded that Schuster was mentally ill since he had a paranoid condition. "This is the type of illness," Carson explained, "in which an entire delusional but logical belief is based on a single false premise, and if one allows the truth of the false premise the patient's behavior no longer appears abnormal . . ." Dr. Carson conceded that while *he* could believe cheating took place in the Regents' examinations in the prison, and that prison officials would be reluctant to have depositions submitted to that effect, he could not believe that anyone would commit a man to a hospital for the criminally insane because of it. Accordingly, he concluded that Schuster must be insane. He was unmoved by Schuster's claim, which the state did not deny, that the prison warden, chief clerk and controller had been dismissed shortly after Schuster made his charges of corruption. We note, further, that the court in the 1963 hearing, refused to consider the legality of Schuster's transfer to Dannemora and concentrated only upon his

then sanity. The court thus dismissed the writ, a decision affirmed by the Appellate Division, 3 Dept., 22 App. Div. 2d 762 (1964) and, without opinion by the New York Court of Appeals, 15 N. Y. 2d 968 (1965).

Undaunted, Schuster initiated a petition for habeas corpus on July 13, 1965, in the United States District Court for the Northern District of New York, alleging that he was sane and that the state procedure by which he was adjudged insane and transferred to Dannemora was unconstitutional. In considering Schuster's request for assignment of counsel after the district court's dismissal of that writ, this court after reviewing the transcript of the 1963 hearing remanded the proceeding to the district court by an order dated February 28, 1967 for an evidentiary hearing on the issue whether the initial transfer to Dannemora was corruptly motivated and directed that counsel be assigned. A hearing on this remand was held on July 12, 1967, during which the court examined not only the issue of corrupt transfer but also such questions as whether petitioner was mentally ill in 1941, and is now, and whether the procedures which had been accorded petitioner were proper. Judge Port again dismissed the writ on December 8, 1967, and this appeal followed.[4]

II.

The Right to a Full Hearing

Schuster has maintained that his transfer to Dannemora in 1941 was effected in violation of his right to equal pro-

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[4] Schuster did not request a certificate of probable cause before filing this appeal. He did, however, make such a request at an earlier stage of the proceedings and Judge Port granted the certificate after denying Schuster's 1965 petition. At oral argument, we announced that a further certificate was not required. See 28 U. S. C. § 2253.

tection of the law under the 14th Amendment. His claim is grounded on the contention that he was not given the same procedural rights in contesting the transfer which are afforded civilians similarly facing involuntary commitment to a mental institution. It is urged on his behalf, therefore, that he be returned to Clinton Prison where he will be eligible for parole and at least be removed from the grievously distressing atmosphere of an institution like Dannemora which houses the insane.

A. *The Effect of the Transfer from Clinton Prison to Dannemora*

The state characterizes Schuster's transfer from Clinton to Dannemora as no more than a mere administrative matter, claiming that it represented a simple change in the place of detention and that this action was beyond the purview of judicial review. See *People ex rel. Sacconanno* v. *Shaw*, 4 App. Div. 2d 817, 164 N. Y. S. 2d 750 (3d Dept. 1957); *Urban* v. *Settle*, 298 F. 2d 592 (8th Cir. 1962); 28 U. S. C. § 4241.[5] "There is no doubt," as the Supreme Court has recently remarked, "that discipline and administration of state detention facilities are state functions. They are subject to federal authority only where paramount federal constitutional or statutory rights supervene. It is clear, however, that in instances where state regulations applicable to inmates of prison facilities conflict with such rights, the regulations may be invalidated." *Johnson* v. *Avery*, Docket No. 40 (U. S. Sup. Ct. decided February 24, 1969). It is not too difficult, in this regard, to discern that a transfer of the character confronting us involves rights of the nature described by the Supreme Court. Not only

[5] Although the State argued that the prisoner commitment procedures in the federal system are analogous to New York Correction Law § 383, the validity of those federal procedures is not before us now.

did the transfer effectively eliminate the possibility of Schuster's parole, but it significantly increased the restraints upon him, exposed him to extraordinary hardships, and caused him to suffer indignities, frustrations and dangers, both physical and psychological, he would not be required to endure in a typical prison setting.

The adversities and rigors of an institution such as Dannemora have been catalogued in a scholarly and persuasive study of the problem by a distinguished committee of the Association of the Bar of the City of New York. Special Committee on the Study of Commitment Procedures and the Law Relating to Incompetents of the Ass'n of the Bar of the City of New York, Mental Illness, Due Process, and the Criminal Defendant 23-26 (1968) [hereinafter cited as N. Y. Bar Report]. The members of this eminent body included New York State's Commissioner of Correction, a deputy commissioner of the Department of Mental Hygiene, four state Supreme Court Justices, the Director of Matteawan State Hospital, the Director of Central Islip State Hospital, the Director of Psychiatry at Bellevue Hosiptal, New York, two assistant district attorneys, the Director of the Mental Health Information Service for the First Judicial Department, a professor of law, and other distinguished practicing attorneys and physicians. It spent two years exhaustively studying the problem, aided by an able staff under the direction of Malachy T. Mahon, now Dean of the Law School of Hofstra University. As a measure of its position as a respected initiator of needed reforms, we notice that the Committee's prior report, made in 1962, led to substantial changes in the Mental Hygiene Law, particularly in what is now § 72-74, the procedures for involuntary civil commitment.

In considering the problem posed we are faced with the obvious but terrifying posibility that the transferred prisoner may not be mentally ill at all. Yet he will be confined

with men who are not only mad but dangerously so. As the New York Courts have themselves indicated, he will be exposed to physical, emotional and general mental agony. Confined wth those who are insane, told repeatedly that he too is insane and indeed treated as insane, it does not take much for a man to question his own sanity and in the end to succumb to some mental abberation. Cf. *Dennison* v. *New York,* 49 Misc. 2d 533, 267 N. Y. S. 2d 920 (Ct. Cl. 1960), rev'd on other grounds 28 App. Div. 608 (3d Dept. 1967); *People ex rel. Cirrone* v. *Hoffmann,* 255 App. Div. 404, 407, 8 N. Y. S. 2d 83, 86 (3d Dept.); *People ex rel. Brown* v. *Johnson, supra.*

Moreover, the facts reveal that there always lurks the grisly possibility that a prisoner placed in Dannemora will be marooned and forsaken. For example, Matteawan State Hospital is the functional equivalent of Dannemora for those convicted of misdemeanors, for female prisoners and for those civilly committed who are found to be dangerous under Mental Hygiene Law § 85. See Corection Law § 400. The commitment procedures for prisoners to either hospital are identical. See Correction Law § 408. Matteawan has 119 inmates who have been confined there since 1935, 29 since 1925, and 4 patients who have been there since at least 1915—over half a century. Morris, *supra,* at 656. The New York Bar Association study discloses the startling information that as of November 1, 1965, one inmate, then 83 years old, had been at Matteawan since 1901, when as an uneducated boy of 19 years he was imprisoned in this maximum-security institution for the insane. N. Y. Bar Report at 72. The study also reveals another individual who was accused of stealing a horse and buggy in 1905, committed to Matteawan after pleading not guilty and found to suffer "acute delusional insanity." This inmate was more fortunate than the former; he was released

59 years later at the age of 89 because he was no longer "a menace to society or other patients." N. Y. Bar n. 1 at 72. See also *Dennison* v. *State, supra,* in which the plaintiff was initially awarded $115,000 in damages after wrongly spending 24 years in Dannemora because he had stolen candy valued at $5.00 at the age of 16.[6]

Moreover, there is considerable evidence that a prolonged commitment in an institution providing only custodial confinement for the "mentally sick" and nothing more may itself cause serious psychological harm or exacerbate any pre-existing condition. As one psychiatrist has explained: "[U]nder prevailing conditions, we superimpose new disabilities on existing disabilities—at least in many cases—when we forcibly commit sick people to places called mental hospitals which in reality remain custodial asylums." Hearings on Constitutional Rights of the Mentally Ill before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 87th Cong., 1st Sess. pt. 1 at 44. And, as another has warned: "There is repetitive evidence that once a patient has remained in a large mental hospital for two years or more, he is quite unlikely to leave except by death. He becomes one of the large mass of so-called 'chronic' patients." Bloomberg, A Proposal for a Community-based Hospital as a Branch of a

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[6] The spectre of unwarranted commitment of such lengthy duration may be somewhat diminished by recent statutory provisions requiring periodic review for noncriminal persons involuntarily committed to state mental institutions, Mental Hygiene Law § 73, and decisions leading to similar review for committed prisoners at the time their sentences expire. See *Baxstrom, infra.* None of these developments however offer any comfort to persons in Schuster's position, since the former are by their terms inapplicable to prisoners, and even the latter is of little help to one serving a long sentence.

State Hospital, cited in Katz, Goldstein & Dershowitz, Psycho-Analysis, Psychiatry & the Law, at 664 (1967).[7]

In addition, by its very nature, confinement at an institution for the criminally insane is far more restrictive than at a prison. Nothing more dramatically illustrates this difference than the petty indignities to which inmates in the former are subjected. For example, their visiting and correspondence rights are curtailed. In the appendix we reproduce a *pro se* petition by a prisoner in a similar institution in Massachusetts listing at least thirty-five such differences illustrating that these seemingly small but numerous indignities may accumulate to the point where the prisoner-patients consider them the most galling of all restraints.

Finally as the court below stated, prisoners held in Dannemora are in practice not even called for hearing by the Parole Board. By contrast, had Schuster remained in Clinton, he might have returned to society over 20 years ago. Additionally, as long as Schuster is considered insane, New York law prevents him from seeking to vacate his

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[7] And a New York court commented, 30 years ago, that:

"It would be unnecessary to point out that relator's fundamental rights would be infringed, when sentenced to a state prison for normals, were he to be confined with mental defectives whose appearance, speech, and personal habits are abhorrent, as clearly as would be the case if he were required to live in a madhouse, or in fear of injury by untrained or unmanageable animals, if he were constantly subjected to offensive odors, or if confined for long periods to a dungeon or solitary confinement or, like Byron's Prisoner of Chillon, he were chained to a dungeon pillar. Constant association with imbeciles, and suffering from the personal behavior associated with many of them, doubtless tend . . . to force the normal to grow like them. . . . The law of this State recognizes the fact that mental cruelty may be quite as real and quite as devastating as physical pain." *People ex rel. Cirrone* v. *Hoffman,* 255 App. Div. 404, 8 N. Y. S. 2d 83 (3d Dept. 1938).

original conviction by a writ of *coram nobis*. *People* v. *Booth*, 17 N. Y. 2d 681, 216 N. E. 2d 215, 269 N. Y. S. 2d 457 (1966).

We are not alone in attributing significance to a transfer from a prison to an institution for the criminally insane. Recognizing that such a transfer may cause further substantial deprivation of libertes, New York's own courts have permitted a prisoner to challenge his transfer by writ of habeas corpus. *People ex rel. Brown* v. *Johnson, supra.* Thus, the New York Court of Appeals stressed that "any *further* restraint *in excess* of that permitted by the judgment or constitutional guarantees should be subject to inquiry. An individual, once validly convicted and placed under the jurisdiction of the Department of Correction . . . is not to be divested of all rights and unalterably abandoned and forgotten by the remainder of society." 9 N. Y. 2d at 485, 174 N. E. 2d at 726, 215 N. Y. S. 2d at 45-46 (emphasis in the original).

Accordingly, we would delude ourselves if we believed that a prisoner's transfer to a prison maintained for the criminally insane is a mere administrative matter. Prison and asylum are divided by far more than the few miles that separate Clinton and Dannemora. In view of the substantial deprivations, hardships and indignities such a move may produce, judicial scrutiny is necessary to ensure that the procedures preceding the transfer adequately safeguard the fundamental rights of the prisoner.

B. *Differences in Commitment Procedures for Prisoners and Civilians*

Under § 383 of the Correction Law, as it read at the time of Schuster's transfer in 1941, a prisoner could be transferred to Dannemora solely on the certification of a single doctor (even a non-psychiatrist), without a hearing or judicial review of any kind. However, at that time an in-

voluntary commitment of a civilian to a mental institution required the examination of two qualified examiners (instead of a single prison physician, who conceivably could be influenced by Schuster's charges that the institution he served was corrupt), notice of the commitment proceedings (Schuster claims he was not told in advance of the nature of the proceeding which led to his transfer and was transferred within 24 hours after he was seen by a prison doctor), a hearing before a judge on the question of sanity, which insured the right of cross-examination, etc., and a court order of commitment—none of which was afforded Schuster. Law of April 24, 1933, ch. 395 § 12, [1933] Laws of N. Y. 931-34 (repealed 1965; now replaced by N. Y. Mental Hygiene Law §§ 72-74).

C. *Equal Protection*

We believe that the substantial disparity between the procedural protections afforded civilians facing involuntary commitment to a mental institution and those given Schuster deprived him of the equal protection of the laws, within the meaning of the Fourteenth Amendment. This is the only logical deduction that can follow from an analysis of recent Supreme Court decisions on the subject.

Baxstrom v. *Herold,* 383 U. S. 107 (1966) sparked an awareness that we cannot tolerate two classes of insane persons—criminal and non-criminal,—when we are asked to examine commitment procedures available to both. In that case, the Court struck down § 384 of New York's Correction Law, which dealt with the commitment procedures for persons transferred to Dannemora as prisoners, whom the state wished to keep institutionalized after the expiration of their prison sentences. The procedures for commitment provided by § 384 were basically the same as those for civilly-committed persons except that the latter had the right to *de novo* review by jury trial of the ques-

tion of their sanity under § 74 of the Mental Hygiene Law, whereas prisoners in Baxstrom's position did not. Additionally, the decision whether to send a person committed under § 384 to Dannemora or to a civil hospital was completely within the discretion of administrative officials, while one civilly committed could be sent to Matteawan only after a judicial determination that his presence in a civil hospital would be dangerous to the safety of others. Mental Hygiene Law § 85. These differences the Court held, in a unanimous opinion, constituted a denial of equal protection. It rejected absolutely the state's argument that one could validly distinguish between the two groups because ex-convicts *ipso facto* had dangerous or criminal propensities. Positing that prisoners whose sentences are about to expire are entitled to the same procedural protection before further confinement as civilians who face initial commitment to a mental institution, Chief Justice Warren explained: "Classification of mentally ill persons as either insane or dangerously insane of course may be a reasonable distinction for purposes of determining the type of custodial or medical care to be given, but it has no relevance whatever in the context of the opportunity to show whether a person is mentally ill *at all.*" 383 U. S. at 111 (emphasis in the original).

Judge Port believed *Baxstrom* inapposite to the case at bar. He reasoned that because Johnnie Baxstrom was nearing the end of his sentence when he was committed under § 384 and hence was no longer a prisoner, his commitment was in effect "civil" and had to meet the standards of every other civil commitment. Since Schuster is still a prisoner, Judge Port concluded, he is entitled only to the same treatment as every other prisoner in custody.

This analysis, we believe, misses the mark. *Baxstrom* clearly instructs that the *procedures* to be followed in determining whether one is committable must be unaffected

by the irrelevant circumstance that one is or has recently been under sentence pursuant to a criminal conviction, although the fact that one has committed a crime may be relevant to the substantive conclusion that he is mentally ill. As one court explained: "The Supreme Court struck down the New York system not because Baxstrom was reaching the end of his sentence, but because it held dangerousness is not relevant to the procedures for determining whether a 'person is mentally ill at all. . . .' *Baxstrom* thus might be said to require a conclusion that while criminal conduct is relevant to the determination whether a person is mentally ill and dangerous it cannot justify denial of procedural safeguards under that determination." *Cameron* v. *Mullin,* 387 F. 2d 193, 201 (D. C. Cir. 1967). See also *People* v. *Fuller,* Docket Nos. 438-441, 484 (N. Y. Ct. App. April 11, 1969), slipsheet at 8.

The teaching of *Baxstrom*—that a finding of dangerous or cirminal behavior does not obviate the necessity for a separate and adequate determination of committability—has also found application in other related cases. Thus, for example, this court declared even before *Baxstrom* that an ex-convict who became insane after his release from prison could not be denied the same hearing available before commitment to one who had never been incarcerated. *United States ex rel. Carroll* v. *McNeill,* 294 F. 2d 117 (2d Cir. 1961),[8] appeal dismissed as moot 369 U. S. 149 (1962).

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[8] Judge Waterman, writing for a panel which included Chief Judge Lumbard and Judge Woodbury of the First Circuit sitting by designation, made the point with clarity:

> "We find nothing to demonstrate that ex-convicts who, after the expiration of their sentences become mentally ill, are inherently more dangerous than those mentally ill who are not ex-convicts. In fact, there are many criminal tendencies that are in no way violent tendencies just as there are many convicts and ex-

(*footnote continued on following page*)

Appendix A.

Baxstrom has also extended its influence to other related instances. Both the New York courts, *People* v. *Lally*, 19 N. Y. 2d 27, 224 N. E. 2d 87, 277 N. Y. S. 2d 654 (1966) and the federal courts, *Cameron* v. *Mullin, supra*, *Bolton* v. *Harris*, 395 F. 2d 642 (D. C. Cir. 1968), have made it clear that one who has been adjudicated not guilty by reason of insanity is entitled to the same procedures used to determine committability of an individual who is not otherwise before a court. In *Lally*, the court embraced not only the specific holding of *Baxstrom*, but its broad purpose as well, since the court declared its intent was "to comply with the spirit if not the express language of the *Baxstrom* decision." 277 N. Y. S. 2d at 660.

In *Specht* v. *Patterson*, 386 U. S. 605 (1967), the Supreme Court, again in a unanimous holding, further sharpened the distinction between a finding of criminal activity and a finding of committability by reason of mental illness, holding that a *convicted* sex offender was entitled to a further hearing on the question of illness before he could be sentenced to an indefinite term as an "habitual offender and mentally ill." *Specht* has since been followed by New York and applied to this state's sex offender statute. *People* v. *Bailey*, 21 N. Y. 2d 588, 289 N. Y. S. 2d 943 (1968).

In *People ex rel. Goldfinger* v. *Johnson*, 53 Misc. 2d 949, 280 N. Y. S. 2d 304 (Sup. Ct. 1967), a New York court has extended the *Baxstrom* rationale to a youth transferred from a correctional school (where he was placed after

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(*footnote continued from previous page*)

convicts whose crimes were nonviolent crimes. Nor, even if such an ex-convict should become dangerously insane, does there appear to be any justification for more hastily transferring him to Matteawan after his commission of a dangerous act at an ordinary mental hospital than in transferring any other patient who has committed such an act at such a hospital but whose transfer is nevertheless delayed until after he shall have had a judicial hearing." 294 F. 2d at 123.

pleading guilty to attempted assault), to an institution for defective delinquents. The court remarked, in requiring a hearing before the transfer could be effected "whatever procedural distinctions and niceties may hitherto have obtained, they are no longer valid since the advent of *Baxstrom, Specht* and *Lally.*" 280 N. Y. S. 2d at 307.

Most recently, in *People* v. *Fuller, et al., supra,* the New York Court of Appeals declared that persons convicted of felonies or misdemeanors who were then committed for treatment as narcotics addicts were entitled to a jury trial on the question of addiction. The court reasoned that since non-criminals civilly committed for addiction were given such a trial, it would violate the equal protection clause of the 14th Amendment to deny this right to those addicts who happened to be concurrently convicted of a crime. The court relied upon *Baxstrom* v. *Herold,* reading that case, as we do, to require an examination of the substance of the proceeding, not its form. It found commitment for treatment basically a proceeding involving a sick person who needed help. Schuster was sent to Dannemora for the same reason. He was alleged to be mentally sick (paranoid) and those transferring him there did so, we are told, for his "care and treatment." Accordingly we see no logic or reason for distinguishing Schuster's plight from Fuller's. See also *In re Buttonow,* 23 N. Y. 2d 385 (1968).

D. *The Procedures Now Followed for Commitment of Criminals and Civilians*

Since Schuster's transfer to Dannemora in 1941, New York has substantially revised its commitment procedures both for prisoners and non-prisoners,[9] indicating a con-

[9] Correction Law § 383, added L. 1962 c. 393, amended L. 1964 c. 105; Mental Hygiene Law §§ 72-74, amended L. 1964 c. 738.

tinuing concern that the power to lock people away in "lunatic asylums," whether they be criminals or no, is awesome indeed, and can be abused.

Section 383 of the Correction Law now affords prisoners many of the safeguards that the Mental Hygiene Law provided to civilians in 1941. Before a prisoner may be transferred to Dannemora, he must be given an examination by two independent physicians and on appropriate notice a hearing at which the prisoner can introduce evidence and cross-examine witnesses, and judicial approval must also be secured. N. Y. Correction Law § 383 (McKinney 1968).

At the same time, however, the commitment procedures for non-prisoners have undergone still greater expansion. Thus, in addition to the two-physician certification, and provisions for appropriate notice, hearing and court action, New York also requires for persons being committed involuntarily, review of the need for further confinement 60 days after commitment, another review after one year, followed by periodic reviews every two years thereafter. These regular periodic reviews require in each instance a judicial determination of the need for further institutionalization. Mental Hygiene Law § 73 (McKinney, 1968 Supp.). Moreover, when any of these determinations is adverse to the civil patient, he may obtain *de novo* review on the issue of sanity by a jury. Mental Hygiene Law § 74 (McKinney, 1968 Supp.). New York has also created a "Mental Healt Information Service" whose function it is to study and review the admission of involuntary civilian patients, inform the patients of their rights, present relevant information to the court, and participate in the proceedings mandated by § 72-74, etc. Mental Hygiene Law § 88 (McKinney, 1968 Supp.). See Note, The New York Mental Health Information Service: A New Approach to the Hospitalization of the Mentally Ill, 67 Column. L. Rev. 672 (1967). Thus, it is true, as a sage commented,

that time is what we want most but use worst, for there remains today almost as wide a chasm between the roads traveled by non-prisoners and prisoners as existed in 1941 when Schuster first arrived at Dannemora.

We believe, as we have already indicated, that implicit in *Baxstrom* v. *Herold* is the principle that such disparity as exists even under the present statutes between the procedural rights afforded prisoners and those extended to non-prisoners violates the fundamental requirements of equal protection. Whether a man should be committed for mental illness has no relevance to the place where he happens to be at the time he becomes ill. This much we have surely learned from *Baxstrom* and its progeny.

We hold, therefore, that before a prisoner may be transferred to Dannemora, he is entitled to substantially the same procedures including periodic review of the need for continued commitment in a mental institution and jury trial as are granted to civilians when they are involuntarily committed to a mental hospital. Morever, it does not seem amiss for us to remind those who will conduct the required hearings that the substantive test to be applied is that which New York has laid down for those facing civil commitment: not merely whether Schuster suffers from a "mental disease," but whether that disease is one that "requires care and treatment." Mental Hygiene Law § 2. (See our discussion of Schuster's treatment, *infra.*)

In holding as we do we wish to emphasize that we are mindful of the Supreme Court's admonition that "[e]qual protection does not require that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purposes for which the classification is made." *Baxstrom, supra,* 383 U. S. at 111. See also *Griffin* v. *Illinois,* 351 U. S. 13, 20 (1956). Thus, our decision today does not mean that all distinctions between civilian and prisoner patients must be swept aside. We do say that prisoner patients are entitled to *substantially*

the same safeguards afforded non-prisoners before commitment. For example, § 85 of the Mental Hygiene Law provides that before being committed to Matteawan, there must be a judicial determination that the individual to be committed is dangerous to himself and others. Such a procedure may not be appropriate for a prisoner because the additional security facilities of Matteawan or Dannemora might be thought necessary to confine convicts with sentences still to serve, who may be more prone to escape from a hospital than civilians.[10]

The Bar Association Committee after long study phrased its results in the following recommendations which are in substantial agreement with our conclusions today:

"*General Principles*

"Mentally ill prisoners serving sentences should continue to be hospitalized in institutions under the jurisdiction of the Department of Correction. However, the procedures governing their hospitalization should be modified to provide to such persons some of the rights accorded to civil patients. Safeguards against unnecessary and possibly harmful confinement among the mentally ill are as necessary and important for prisoners as they are for anyone else.

"Recommendation No. 1 (*Admission procedure*). The Correction Law (sections 383, 408) should continue to provide for hospitalization of mentally ill prisoners under sentence in an institution within the Department of Correction upon judicial order entered

[10] The New York Bar Report considered and explicitly rejected the concept that the commitment provisions for civilians and prisoners should be identical. See N. Y. Bar Report at 20. Moreover, that Committee endorsed the practice of maintaining separate facilities for prisoners who become mentally ill, instead of sending them to civil hospitals.

after notice, examination by two examining physicians, and an opportunity to be heard. In addition, however, these statutes should be amended to provide that the Mental Health Information Service should receive notice of such applications, and should have the same powers and perform the same services as set forth in Article 5 of the Mental Hygiene Law as to civil patients.

"'RECOMMENDATION No. 2 (*Periodic review*). The procedures for the involuntary retention and periodic judicial review of ordinary civil patients, including on the occasions of such review the assistance of the Mental Health Information Service, should apply to prisoners hospitalized while serving a sentence.''
N. Y. Bar Report at 2.

E. *The Adequacy of Existing Remedies*

The state has vigorously argued that Schuster has already received all rights to which he is entitled in his 1963 state habeas corpus hearing. We believe however, as did the Supreme Court and the New York Court of Appeals, that habeas corpus is not an adequate substitute for a proper pre-commitment hearing. The writ was available to the patients in both *Baxstrom* and *Lally,* yet neither court deemed this remedy sufficient. Instead they concluded that equal protection required the same procedural protection for ex-prisoners and those acquitted by reason of insanity as was afforded those civilly committed. See *Cameron* v. *Mullin, supra,* at 201; *Bolton* v. *Harris, supra.* Schuster's 1963 hearing indicates how inadequate the great writ can be in circumstances such as this. Only one doctor testified, and he was a man in whom Schuster placed no trust. The insubstantiality of that doctor's testimony may

be characterized as follows: Schuster believes in corruption. I don't believe such corruption existed, ergo Schuster is insane.

In particular, the burden of proof in a habeas corpus proceeding is traditionally upon the petitioner. *Bolton* v. *Harris, supra.* In the case before us, the district court's finding on the crucial question of corruption was simply that Schuster has "failed to sustain the burden of proof on this issue." In a commitment proceeding, by contrast, the burden traditionally seems to have been on the state. Moreover, it may well be that the New York courts will no longer permit habeas corpus as a proper remedy for prisoners committed under § 383 in the belief that the amendment of that section in 1962 obviated the need for the writ, granted for the first time just one year before the amendment in *People ex rel. Brown* v. *Johnson.* See *People ex rel. Carroll* v. *Herold,* 27 App. Div. 2d 958, *People ex rel. Conover* v. *Herold,* 24 App. Div. 2d 773, 263 N. Y. S. 2d 858 (3d Dept. 1965); N. Y. Bar Report n. 26 at 23.[11]

F. *Effect of Our Holding*

Most judicial reform is accompanied by cries of horror and dismay that the action by the court has surely carried

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[11] Although Judge Port on remand did make a determination that Schuster was mentally ill, we believe that the 1967 hearing was inadequate. Counsel had been instructed by the terms of our order that the hearing would be limited to the single question of the veracity of Schuster's charges of prison corruption. And, indeed, Judge Port interpreted the hearing as limited to that issue. Therefore, it is quite obvious from the hearing transcript that counsel were not prepared to present evidence or argument on the matter of Schuster's sanity. In fact, the issue was first introduced by the state on cross-examination. Counsel assured us at oral argument that they have expert witnesses who are prepared to testify that Schuster is sane; and Schuster must be given a proper opportunity to present his case.

society over the brink and into the abyss of administrative chaos. Certainly this was true of *Baxstrom*. When § 384 was invalidated, the New York authorities decided to transfer all patients confined in Dannemora or Matteawan pursuant to that provision—a total of 992 inmates—to civil hospitals. This transfer was designated by them as "Operation Baxstrom."[12] When this decision was announced, some segments of the community were anxious and outraged. Involved labor unions demanded special pay and training for working with the Operation Baxstrom transferees because they were presumptively "dangerous." Residents in the neighborhoods of civil mental hospitals protested the presence of "criminal lunatics" in their midst. Yet in only one year the protests evaporated. The transfer has been an astounding success. Of these nearly 1000 ex-prisoners whom the appropriate state authorities had prior to *Baxstrom* determined to be too dangerous to be placed in a civil hospital, 176 have been fully discharged—147 to their home communities and the rest to other hospitals; 454 others have elected to remain in civil mental hospitals on voluntary or informal status; and only seven have had to be returned to Mattewan after a judicial determination that they were dangerous. As one author has noted, the Baxstrom patients were almost as pure as Ivory Snow; they were 99-28/100 per cent free from dangerous mental illness. See Morris, *supra,* at 672.

What could explain this massive misplacement of people in Matteawan and Dannemora—places which are more restrictive prisons than hospitals? The New York Bar Report indicated it was "another instance of institutionalized expectations putting blinders on our perceptions." N. Y. Bar Report at 227. The very fact that these men were in Dannemora may have induced the circular reasoning which

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[12] See generally Morris, at 670-75; N. Y. Bar Report 221-28.

impelled the New York authorities to the conclusion that they were "dangerous." Perhaps independent judicial examination of patients in Dannemora pursuant to the guidelines laid down in § 73 may contribute to an atmosphere permitting clearer vision. At the very least, the results of Operation Baxstrom indicate that it is not unlikely that a significant number of the patients committed to Dannemora under § 383—particularly those committed under the pre-1962 law like Schuster—may not be so mentally ill as to require denying them the "freedom" of a regular prison.

In any event, we do not believe our decision today even though it requires *inter alia* periodic review of the need to continue prisoners in institutions for the criminally insane will open the proverbial floodgates and unduly burden the courts with frivolous cases. We cannot safely predict that every prisoner-patient will demand the review we here make available. For example, 454 of the patients transferred to civil hospitals in Operation Baxstrom, nearly half the total number, chose to remain hospitalized on a voluntary basis even though they could have contested the validity of their commitment in court by jury trial. N. Y. Bar Report n. 32 at 26. Also, a six-year study of civil commitment procedures by the American Bar Foundation confirms this premise. Its authors state: "In practice this right [to the jury trial in civil commitment proceedings] is seldom invoked, either in California or in those other jurisdictions included in this study. So infrequent are they that over the several months occupied in the study of Los Angeles, we were able to observe only two jury trials." Rock, *et al.*, Hospitalization and Discharge of the Mentally Ill, at 102 (1968).

But even in the unlikely event that every prisoner in a Department of Correction mental hospital does demand the full panoply of procedures to which he is entitled, the total number of such prisoners under sentence at one time is so small compared to the number of involuntarily com-

mitted civilians in state mental hospitals that the effect on the administrative and judicial systems would be minimal. N. Y. Bar Report at 26. On April 1, 1964, there were 85,279 resident patients in the civil state hospitals. At the same time there were fewer than 2,971 patients *of all classes* in *both* Matteawan and Dannemora combined. State of N. Y., Dept. of Mental Hygiene, Office Directory of State and Licensed Mental Institutions 176 (1965) as quoted in N. Y. Bar Report at 26.[13] Moreover, The Department of Mental Hygiene has provided us with statistics which indicate that during the fiscal year ending March 31, 1968, 25,439 persons were involuntarily admitted to state civil mental hospitals, while 152 persons were admitted to Dannemora and 255 to Matteawan. Further, the New York Court of Appeals summarily dismissed the argument that its courts would be burdened when that court ordered jury trials for all cirminals committed for treatment of narcotics addiction. *People* v. *Fuller, supra,* slip-sheet at 9. And it is a fair assumption that the number of addicts involved far exceeds the number of prisoners committed under § 383. We thus add but a trickle of water to an ocean. When measured against the possibility that persons committed as summarily as Schuster were wrongly subjected to the horrors of a prison for the insane, any inconvenience is so small by comparison that we cannot ignore our obligation to re-examine their cases. If we open any "floodgate" today, which we doubt, it is only to provide a flood of long-overdue relief.

III.

Schuster's "Treatment" at Dannemora

At the hearing before Judge Port the rules of evidence were, as he noted in his opinion, "applied with a liberality

[13] Note that these figures were prepared prior to Operation Baxstrom, which may have involved half of the population of Dannemora. See N. Y. Bar Report at 220.

probably not warranted by the remand." In this manner, evidence concerning the treatment accorded Schuster at Dannemora has been called to our attention. As we have already illustrated, that evidence tends to suggest that Schuster does not now receive any therapeutic treatment and does not presently need the merely custodial care with which the institution provides him.

The sole purpose served by Dannemora State Hospital is "confining and caring for such male prisoners as are declared mentally ill while confined in a state prison . . . and others provided for under section three hundred eighty-three." Correction Law § 375. And, according to New York law, one is "mentally ill" when he is "afflicted with mental disease to such an extent that for his own welfare or the welfare of others, or of the community, *he requires care and treatment.*" Mental Hygiene Law § 2 (8) (emphasis added).[14] The statutory scheme thus contemplates that a prisoner will be committed to Dannemora only if he is mentally ill *and* in need of treatment or special custodial care because of the problem he presents to himself or other prisoners. The legislature appeared to presume that one committed under its provisions would be provided with adequate care or treament, the need for which justified the commitment.

In *Rouse* v. *Cameron,* 373 F. 2d 451 (D. C. Cir. 1966), the court indicated that persons committed to a mental hospital after pleading not guilty by reason of insanity have a constitutional right to treatment while institutionalized. Similarly the Supreme Judicial Court of Massachusetts recently declared that one accused of murder but who has been confined in a state mental hospital for the criminally insane instead of being sentenced to prison has a right to challenge the legality of his confinement if the

[14] "Care and treatment" are themselves defined as "medical care, surgical attendance, nursing and medication, as well as food, clothing, and maintenance, furnished to a patient." Mental Hygiene Law § 2(6).

state fails to provide him with adequate treatment. *Nason* v. *Superintendent of Bridgewater State Hospital,* 233 N. E. 2d 908 (Mass. 1968). Indeed, New York courts have themselves taken some steps toward acknowledging this right, at least in relation to those sentenced to indefinite terms as sex offenders. See *People ex rel. Kaganovitch* v. *Wilkins,* 23 App. Div. 2d 178, 259 N. Y. S. 2d 462 (4th Dept. 1965); *People* v. *Jackson,* 20 App. Div. 2d 170, 245 N. Y. S. 2d 534 (3d Dept. 1963); see also *People* v. *Mosher,* 24 App. Div. 2d 47, 263 N. Y. S. 2d 765 (4th Dept. 1965). And in, *People* v. *Fuller, supra,* the New York Court of Appeals stressed the fact that the program under consideration was one for the rehabilitation of addicts, not merely for their detention. Moreover, a growing number of scholars have urged that persons involuntarily committed by the state to mental institutions have a constitutional right to treatment, grounded in either the prohibition against cruel and unusual punishment of the Eighth Amendment or in the due process or equal protection clauses of the Fourteenth Amendment. E.g., Note, Civil Restraint, Mental Illness, and the Right to Treatment, 77 Yale L. J. 87 (1967); Morris, *supra,* at 679-81; Birnbaum, The Right to Treatment, 46 A. B. A. J. 499 (1960). See also *Sas* v. *Maryland,* 334 F. 2d 506, 509 (4th Cir. 1964); *Robinson* v. *California,* 370 U. S. 660; *Easter* v. *District of Columbia,* 361 F. 2d 50 (D. C. Cir. 1966).

While these cases deal with persons who are not currently under a sentence of imprisonment as Schuster is, it may be that this difference in and of itself does not provide an adequate basis for denying him the same protections. The incidence of having been convicted of a crime surely does not deprive a person of all constitutional protections for the duration of his sentence. See, e.g., *Wright* v. *McMann,* 387 F. 2d 519 (2d Cir. 1967). While we do not pass upon the possibility of such a constitutional right to treatment, we are of the view that, in light of the procedural posture of this case, the state may wish to

re-examine the validity of its confinement of Schuster in Dannemora without the treatment for which he was originally committed since it is conceded he does not need purely custodial detention in a mental hospital.

A procedural barrier prevents us from deciding this highly significant question now since Schuster has not yet raised it in the state courts. He brings his case to us, via a petition for a writ of habeas corpus. But see *Wright* v. *McMann, supra.* In such a situation 28 U.S.C. § 2254 requires that "[a]n application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State . . . ."[15]

Arguably, Schuster does not have a remedy in the State courts since New York has held that a civilly-committed patient may not contest the adequacy of his treatment by habeas corpus but must make use of the administrative procedures available under § 86 of the Mental Hygiene Law, which authorizes the Commissioner of Mental Hygiene to conduct investigations and issue reasonable orders in this regard. *People ex rel. Anonymous No. 1* v. *La Burt,* 17 N. Y. 2d 733, 217 N. E. 2d 31, 270 N. Y. S. 2d 206 (memorandum decision), cert. denied, 385 U. S. 936 (1966). However, we believe that the New York courts may wish to consider the applicability of that decision, especially as to prisoners such as Schuster, and due consideration for proper federal-state relations makes it appropriate that we give them an opportunity to do so. Accordingly, we believe that in this particular case it is appropriate that we

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[15] We note the possible argument that Schuster is not "in custody pursuant to the judgment of a State court" since he is in Dannemora under § 383, a purely administrative transfer. However, he would not be subject to § 383 unless he were originally convicted by a state court. Moreover, a state court did consider and reject his claim in his 1963 habeas corpus proceeding.

decline to consider whether Schuster may be further confined in Dannemora absent adequate treatment until he has presented his claims to a state court. We note further that the hearing on the question of Schuster's committability may moot this issue entirely.

We have dealt here solely with the criminal who allegedly becomes mentally ill after his imprisonment. We have not had any need to concern ourseves in this opinion with the individual who is found not guilty by reason of insanity, or who claims he is incapable of assisting counsel in the preparation or defense of his case; that task has been performed by other courts. See *Bolton* v. *Harris, People* v. *Lally, supra.* With this in mind, we can see little justification for utilizing substantially harsher commitment procedures to segregate for care and treatment the mentaly sick criminal from the "normal" criminal than society uses when it determines the mentally sick civilian should be institutionalized for care and treatment and separated from the "normal" civilian. Mental illness is mental illness whether it afflicts the criminal or the king.

In sum, we require that Schuster be given a hearing on the question of his sanity with substantially all the procedures granted to noncriminals who are involuntarily committed as patients in civil mental hospitals. If these procedures result in a determination that Schuster is not mentally ill he is to be returned to Clinton State Prison. The order is reversed and the case is remanded to the district court with instructions to hear and determine petitioner's application unless a hearing is held by the courts of the state determining under the standards set forth herein the issues Schuster raises within 60 days from the date of issuance of the mandate herein, or such further time as the District Court may for good cause allow.

We wish to thank George J. Alexander and Faith A. Seidenberg who were assigned to represent the petitioner, for their able presentation of the issues in this case.

Appendix A.

APPENDIX

NOTE 5

Brief of Donald McEwan, Petitioner Pro Se

By means of the following chart the petitioner proposes to show in detail the penal nature of his confinement [at Bridgewater Treatment Center]. Any one item taken separately is trivial, but together they reflect an attitude, so difficult to represent in any other way, which is even more punitive than that of the administration of the state prison at Walpole.

Though institutional officials may allege otherwise, the only rationale behind the more restrictive rules and regulations of the treatment center is punishment—punishment of those persons whom the commonwealth has declared to be sick. Such treatment is totally destructive of the supposed rehabilitative purpose of the statute.

C. SOME PROBLEMS 1. WHAT THERAPEUTIC SETTINGS ARE APPROPRIATE

Comparison of Punitive Measures

Item	Treatment Center	State Prison at Walpole
Personal clothing	Limited to 3 pairs white underwear, 6 pairs white or gray socks, 1 pair shoes without steel shank. May be ordered only at specified times.	Allowed any color underwear, socks, sweatshirts, bathrobe, pajamas, slippers, shoes without regard to shank, black or blue sweater. No limit, many items available in canteen.
Institutional clothing	Always wrinkled, usually ill-fitting, frequently worn out. All marked by messy stencil with "T.C." and name. Can change only at specified times and places. Cannot have institutional underwear if have personal.	One pair pressed each week; proper size; replaced when worn-out. Shirt only marked, neatly, with name. Change as required in own cell. Underwear issued to everyone.
Punishment (lock-up)	No semblance of trial. Any guard may order.	Only disciplinary Board (composed of deputy supt., a guard and a civilian employee).
Rules and procedures	Different for night and day.	Same all the time.
Free time	Required to be either in yard or rec. room (no choice) or locked in cell.	Choice of yard, TV rooms, gym, chapel, own cell (which is open), other cell-block rec. areas.
Avocational area (free time)	Can enter and leave shops at only one specified time each night.	Can enter and leave whenever shops are open.
Library	Cannot browse; no catalog available.	Open daily for browsing; catalog available.

Appendix A.

Item	Treatment Center	State Prison at Walpole
Visiting	1 hour once a week across table with wire fence underneath.	All morning or afternoon (2½ hours) twice a week, in chairs side by side.
Lawyer visit	In presence of guard.	Private.
Guards	Always "standing over your shoulder," causing tension. Harrassment common.	Discreetly, apart, Leave well-behaved inmates alone.
Rules	Continually being added.	Infrequent changes.
State job	Assigned arbitrarily; just work under threat; little variety.	Inmate's preference consulted in assignment and job changes. Greater variety of jobs.
Pay	More than 50% make lowest wages. Little opportunity for increase.	Only 25% make lowest wage. Easy to move to better paying job.
Marching	To work, evening recreation, church, entertainments, meals.	Only to meals and entertainments.
Entertainments	Sometimes forced to attend.	Always optional.
Common medications (aspirin, cold pills, etc.)	Handed out a dose at a time.	3 days supply or more given at once.
Food and menu	Frequently insipid and unimaginative.	Good quality, good preparation and imagination.
Time to eat	Frequently rushed at night.	Can remain until finished.
Meal schedule	Too close for digestion. (18 hour fast at night.)	Well spaced. (13 hour fast at night.)
Silverware	Frequently only a spoon. Always counted.	Always have appropriate utensils. Not counted.

ON COMPETENCY TO BE FREE—Part Three. ADMINISTRATION AND SUPERVISION

Cells	No lockers; no control of light from inside; no lamps allowed. No smoking. Arrangments of furniture, blankets, etc. specified in detail. No glass objects or food allowed.	Wall locker provided; light switch inside; lamps allowed. Smoking allowed. No specification on arrangement. Glass objects and food allowed.
Institutional radio	None.	Two stations on earphone in cell.
Sleep at night	Frequently disturbed by guards.	Rarely disturbed.

Appendix A.

Item	Treatment Center	State Prison at Walpole
Corridors	No smoking (though guards may).	Smoking allowed.
Personal safety razor	Not allowed.	Issued by institution and available in canteen.
Personal appearance	Told when to get haircut, shave. No beards allowed.	Left to individual. Beards allowed.
Canteen orders	Must be made 4 days in advance. One order per week.	Six times a week by order (same day delivery). A summer canteen in yard daily for purchases in person.
Canteen	Operated by civilians. High prices, low profits.	Operated by inmates, Low prices, high profits.
Cigarette lighters, nail clippers, metal ballpoint refills, stingers	Not allowed.	Available for purchase in canteen.
National slick magazines (Life, Newsweek, etc.)	Censored and sometimes multilated.	Not censored; delivered intact.
Sanitary facilities	Primitive, no running water in cell; showers available only at specified times; frequently only 1 toilet for entire population (100+).	Modern toilet and basin in cell; showers available any free time.
Minimum security section	None.	Yes.
Trustee status	None.	Opportunities to work outside the wall. Special passes inside.
Mail	Frequently delayed by being passed to various persons. Outgoing certified mail may take weeks. Supt. includes apology in all mail to public officials. Censor stamp used on all mail.	Prompt delivery both incoming and outgoing. No unauthorized missives enclosed. Censor stamp not ordinarily used.
Inmate Council	Appointed by staff.	Elected by inmates.

Katz, Goldstein and Dershowitz PSYCHOANALYSIS PSYCHIATRY AND LAW at 701-702 (1967)

Appendix A.

MOORE, *Circuit Judge* (dissenting):

This case comes before us as an appeal from an order of a federal district court which denied a writ of habeas corpus to a prisoner in a New York State prison. The petition for the writ challenged the legality of his transfer in 1941 from the Clinton Prison to the Dannemora State Hospital (mental cases).

Since I am particularly concerned with the trend towards judicial legislation by the federal courts, I feel that I should set forth my views. And to place this case in a proper factual setting, I must first state what this appeal does not, in my opinion, involve.

We are not reviewing (or at least should not be) the life of Roy Schuster and the matrimonial difficulties which plagued him. Not knowing the facts, I am not qualified, as the majority seem to be, to pass on the merits of the "industrious" Schuster, who after a "tragic peroration" drew from his pocket a revolver with which he killed his troublesome wife and wounded his lawyer, thus attempting to follow Shakespearean precepts. Nor am I prepared to speculate on the merits of his defense that he was in a state of panic and did not know what he was doing. Schuster was indicted for first degree murder. His plea must have made some impression on the jury because he was convicted of second (instead of first) degree murder and was sentenced to imprisonment for a period of from twenty-five years to life. Since there is no record of any appeal, it may well be that Schuster in 1931 preferred life to death.

These events brought Schuster to Sing Sing and then to the Clinton Prison.

The merits of Schuster's model life in prison and his expectancy for parole in 1948 are interesting history but not relevant to the issue before us.

Appendix A.

In 1941 Schuster was transferred to Dannemora, which transfer concededly "accorded with the provisions of § 383 of the New York Correction Law as it then read", namely, upon the certification of a single prison doctor. Again, I am not in a position (and I have some doubt as to whether the majority is) to know of the doctor's "qualifications in psychiatry" or to find that his opinion was delivered with "breathtaking simplicity."

At the hearing in 1967 before Judge Port, Schuster is said to have testified that in 1941 he met with two doctors but with modern-day enlightenment the majority find that Schuster was "not represented by counsel" and was not "afforded on opportunity to cross-examine the doctors." He certainly received no *Miranda* warnings, assuming that Miranda was old enough at the time to be warned of anything except not to touch hot stoves. From the record the majority concludes in a quasi-phychiatric-legal way that they are "forced to the unhappy conclusion that Schuster is simply a forgotten man in a mental institution which has nothing to offer him." On the prescriptive side, they find that since he receives "no treatment [and] is not occupied in therapy of any kind" that, therefore, "he appears not to be in need of the Dannemora type of confinement and is able to keep his equilibrium only through his own efforts and his hope that he is preparing himself for the day when he will be released." But whether he should have treatment or not, or should have Dannemora confinement, is not in my opinion a problem to be solved by a federal court of appeals. New York State has its own laws enacted by enlightened legislators and its own competent judiciary. We are not dealing with the laws and practices of a barbarous nation. Before we dictate to the State and override State procedures, we should exercise a modicum of that "due process" which is so easy to impose on others but so difficult to impose on oneself.

Appendix A.

In my opinion, it is not for us to review and question the various State proceedings from 1948 to date. The only problem facing us on this appeal is what are Schuster's rights, if any, today and how may they be secured?

A bibliography of the books and newspaper articles concerning the sad plight of those confined in State and Federal mental institutions would be encyclopedic. I accept the nobleness of purpose which prompts such writings and would, with them, wish that a magic wand or pill could cure all the mental ills that so increasingly seem to beset so many. And the majority may know (I do not) of the "indignities, frustrations and dangers, both physical and psychological," which Schuster is enduring. Nor do I think that this is the time or place to speculate as to "the grisly [a word made popular as a result of *Fay* v. *Noia*, 372 U. S. at 440] possibility that a prisoner placed in Dannemora will be marooned and forsaken." Shades of the Bastille in 1789!

Nor would I find it helpful to decision here to review the cases of various persons committed to Matteawan or the case of the gentleman in Massachusetts whose *pro se* petition lists *in extenso* some 35 items which he finds distasteful in his Massachusetts prison. Our problem is not to enact judicial legislation for the State of New York or to write opinions for its Court of Appeals but rather to examine its laws and decisions to ascertain whether they are the product of a benighted State. We must think and act in the light of present conditions. The majority apparently relate the present to the past because they say "the substantial disparity between the procedural protections afforded civilians facing involuntary commitment to a mental institution and those given Schuster deprived him of equal protection of the laws, within the meaning of the Fourteenth Amendment." In short, must all prisoners now confined in mental institutions be accorded retrospectively

the prospective rights of mentally ill civilians? Of course, such a hypothesis would be an impossibility. However, such rights currently bestowed may be a guide to a solution here.

We are not (or certainly should not be) dealing with an abstract situation such as future transfer of prisoners who may be mentally ill. Therefore, I take issue directly with the majority's attempted enactment of a New York law which they phrase as "before a prisoner may be transferred to Dannemora, he is entitled to substantially the same procedures including periodic review of the need for continued commitment in a mental institution as are granted to civilians when they are involuntarily committed to a mental hospital." Furthermore I regard it as highly presumptuous on our part to "remind those who will conduct the required hearings that the substantive test to be applied is that which New York has laid down for those facing civil commitment."

Nor is a person suffering from a mental disease entitled to release from a mental institution merely because "treatment" is not recommended or has not as yet been discovered. If "treatment" there be, no one should oppose every effort to cure, and I would willingly join that "growing number of scholars [who] have urged that persons involuntarily committed by the state to mental institutions have a constitutional right to treatment, grounded in either the prohibition against cruel and unusual punishment of the Eighth Amendment or in the due process or equal protection clauses of the Fourteenth Amendment." How shocked would be the draftsmen of the Constitution if they had known that they were protecting the right to treatment of the mentally ill exclusively for ultimate federal court decision. Rather, in my opinion, they would have said that such questions should be reserved for the States.

The key to the proper solution here is to be found in the majority opinion. They "believe that the New York

courts may wish to consider the applicability of [*People ex rel. Anonymous No. 1* v. *La Burt,* 17 N. Y. 2d 738], especially as to prisoners such as Schuster, and due consideration for proper federal-state relations makes it appropriate that we give them an opportunity to do so." And with their conclusion I agree, namely, "that in this particular case it is appropriate that we decline to consider whether Schuster may be further confined in Dannemora absent adequate treatment until he has presented his claims to a state court."

When these claims are presented as indicated, I have little doubt but that the State courts, which are showing as much concern for the mentally ill as the majority evince here, in the light of their recent decisions will afford Schuster a full opportunity to present his case on the merits with the privilege of necessary witnesses and counsel retained or appointed.

In *People ex rel. Brown* v. *Johnston,* 9 N. Y. 2d 482 (1961), a prisoner validly incarcerated in the Attica State Prison had been transferred for mental reasons to Dannemora State Hospital. He sought to challenge this removal by a writ of habeas corpus. The Court of Appeals held that the writ could be invoked "to obtain a hearing to test the validity of a commitment in an institution for the criminally insane" (p. 485) and that "a denial of a writ precluding a hearing to test sanity, would be egregious" (p. 486).

In *People* v. *Lally,* 19 N. Y. 2d 27, 33 (1967), the Court said, "The appellant can always (as he has done in the past in habeas corpus) challenge the validity of his continued detention by alleging and showing that he is not in fact insane. Also, he can make an application under subdivision (5) of section 454, as he has done here, and ask for a hearing as to his present condition."

These decisions, read in connection with *People* v. *Jackson,* 20 A. D. 2d 170 (1963), and *People* v. *Bailey,* 21 N. Y.

2d 588 (1968), are a fair indication that the courts in New York would give full consideration to Schuster's application for relief. This conclusion is reinforced by the decision of the United States Supreme Court in *Baxstrom* v. *Herold,* 383 U. S. 107 (1966), wherein the Court said at p. 115, "In order to accord petitioner the equal protection of the laws, he was and is entitled to a review of the determination as to his sanity in conformity with proceedings granted all others civilly committed under § 74 of the New York Mental Hygiene Law. He is also entitled to a hearing under the procedure granted all others by § 85 of the New York Mental Hygiene Law to determine whether he is so dangerously mentally ill that he must remain in a hospital maintained by the Department of Correction."

My dissent is based upon the inconsistency of talking about federal-state relations and having Schuster present his claims to a State court and then decreeing that "Schuster be given a hearing on the question of his sanity with substantially all the procedures granted to non-criminals who are involuntarily committed as patients in civil mental hospitals," and that if "these procedures result in a determination that Schuster is not mentally ill he is to be returned to Clinton State Prison." About all that is lacking in such a decree is the number of the cell he is to occupy temporarily and a direction to the State Parole Board that they convene and release him at once. I also find a substantial inconsistency between telling Schuster to present his claims to a State court and remanding his case to the district court with instructions to hear and determine petitioner's application "unless a hearing is held by the courts of the state determining under the standards set forth herein the issues Schuster raises within 60 days from the date of the issuance of the mandate herein, * * *." In other words, the New York courts are to exercise no inde-

pendent judgment but merely to accept without question the new federally-created statute for the State of New York which the majority has enacted and then abjectly follow the majority's views as to the proper operation of the State's prison system.

My desire to have Schuster's present condition properly and adequately tested is as great as the majority's. If he should no longer be in Dannemora (and from the papers before us this would appear to be probable), then he should be transferred to a non-mental prison, and should be given the type of consideration accorded by the Parole Board to all eligible prisoners. But all these procedures should, in my opinion, be under the auspices of the courts of New York until complete disregard of its laws and decisions is shown. Therefore, I would affirm the decision below. When, as and if such recourse to State courts is had, Schuster is, of course, free to seek further relief from the federal courts in the light of the State court's proceedings and the results thereof.

APPENDIX B—Relevant Statutes.

Correction Law of New York § 383 in 1941

"SECTION 383. TRANSFER OF PRISONERS IN STATE PRISONS, REFORMATORIES AND PENITENTIARIES AND IN THE INSTITUTION FOR MALE DEFECTIVE DELINQUENTS TO DANNEMORA STATE HOSPITAL.—Whenever the physician or the psychiatrist of any one of the state prisons, reformatories or penitentiaries or of the institution for male defective delinquents shall certify to the warden or superintendent thereof, that a male prisoner confined therein and sentenced or committed thereto for a felony, is, in his opinion, insane, such warden or superintendent shall cause such prisoner to be transferred to the Dannemora State Hospital and delivered to the medical superintendent thereof. Such superintendent shall receive the prisoner into such hospital, and retain him there until legally discharged. The warden or superintendent, before transferring such insane prisoner, shall see that he is in a state of body bodily cleanliness, and is provided with a new suit of clothing similar to that furnished to prisoners on their discharge from prison. At the time of such transfer, there shall be transmitted to the superintendent of such hospital the original certificate of conviction and the certificate of insanity executed by the physician or psychiatrist, which shall be filed in the office of such superintendent who shall file a notice of such transfer in the office of the department of correction."

Correction Law of New York § 386 in 1941

"SECTION 386. PRISONERS ON RECOVERY TO BE TRANSFERRED TO PRISON.—Whenever any prisoner who shall have been confined in such hospital as an insane person, shall have recovered before the expiration of his sentence, and the superintendent thereof shall so certify in writing to the warden or superintendent of the institution from which

such prisoner was received, or to which the commissioner of correction may direct that he be transferred, such prisoner shall forthwith be transferred to the institution from which he came, by the superintendent of the hospital, or, if received from one of the state prisons, to such state prison as the commissioner of correction may direct; and the warden or superintendent of such institution shall receive such prisoner into such institution, and shall, in all respects, treat him as when originally sentenced to imprisonment."

Correction Law of New York § 387 in 1941

"SECTION 387. CERTIFICATE OF CONVICTION TO BE DELIVERED TO SUPERINTENDENT AND COPY FILED.—Whenever a prisoner is transferred to the Dannemora State Hospital, the warden or superintendent in charge of the prison, penitentiary, or reformatory from which such prisoner is transferred, shall cause a copy of the original certificate of conviction of such prisoner to be filed in the office of such warden or superintendent, and shall deliver the original certificate to the superintendent of such hospital; and whenever any such prisoner shall be transferred to any correctional institution from such hospital, as hereinbefore provided, the superintendent shall deliver to the warden, or superintendent in charge of such institution, such original certificate, which shall be filed in the clerk's office of the same."

Correction Law of New York § 383 Presently Effective

§ 383. Commitment of mentally ill prisoners to the Dannemora state hospital

1. Whenever the physician or the psychiatrist of any one of the state prisons, state correctional institutions, reformatories, penitentiaries or of the Eastern Correctional

Institution shall certify to the warden or superintendent thereof that a male prisoner confined therein and sentenced or committed thereto for a felony or committed to or retained by the Eastern Correctional Institution pursuant to the provisions of sections four hundred thirty-eight, four hundred thirty-eight-a, four hundred thirty-eight-b, and four hundred forty[1] of this chapter, is in his opinion mentally ill, such warden or other officer shall apply to a judge of a court of record to cause an examination to be made of such person by two examining physicians other than a physician connected with such state prison, state correctional institution, reformatory, penitentiary or of the Eastern Correctional Institution. Such physicians shall be designated by the judge to whom the application is made. An examing[2] physician, within the meaning of this article is a physician possessing the qualifications prescribed by the provisions of section two of the mental hygiene law. Such physicians, if satisfied, after a personal examination, that such prisoner is mentally ill, shall make a certificate to such effect.

1-a. In the city of New York, if the physician of a workhouse, city prison, penitentiary or reformatory reports in writing to the warden or other officer in charge of such institution that a prisoner confined therein, serving a sentence for a felony, is in his opinion mentally ill, the warden or other officer in charge of said institution shall either transfer said prisoner to Bellevue or Kings county hospital for observation as to his mental condition by two examining physicians or shall secure two examining physicians to make such examination in his institution. Such

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[1] Section 440 was repealed by L. 1966, c. 891, § 1, eff. July 29, 1966.

[2] So in original. Probably should read "examining".

physicians, if satisfied from their personal examination and observation that the prisoner is mentally ill, shall make a certificate to such effect.

2. Upon such certificate of the examining physicians being so made, it shall be delivered to the warden or other officer in charge, who shall thereupon apply by petition forthwith to a judge of a court of record, annexing such certificate to his petition, for an order commiting[3] such convict to the Dannemora state hospital. Upon every such application for such an order of commitment, notice thereof in writing of at least three days, together with a copy of the petition, shall be served upon the alleged mentally ill person, and in addition thereto such notice and copy of the petition shall be served by registered mail upon either the wife, the father or mother or other nearest relative of such alleged mentally ill person, if there be any such known relative within the state; and if not, such notice shall be served upon any known friend of such alleged mentally ill person within the state. If there be no such known relative or friend within the state, the giving of such notice shall be dispensed with, but in such case the petition for the commitment shall recite the reasons why service of such notice on a relative or friend of the alleged mentally ill person was dispensed with and in such case the order for commitment shall recite why service of such notice on a relative or friend of the alleged mentally ill person was dispensed with.

3. The judge to whom such application for the commitment of the alleged mentally ill person is made may, if no demand is made for a hearing in behalf of the alleged mentally ill person, proceed forthwith on the return day of such notice to determine the question of mental condition

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[3] So in original. Probably should read "committing".

and if satisfied that the alleged mentally ill person is mentally ill, may immediately issue an order for the commitment of such alleged mentally ill person to the Dannemora state hospital.

4. Upon the demand for a hearing by the convict, any relative or near friend on behalf of such alleged mentally ill person, the judge shall, or he may upon his own motion where there is no demand for a hearing, issue an order directing the hearing of such application before him at a time not more than five days from the date of such order which shall be served upon the parties interested in the application and upon such other persons as the judge, in his discretion may name. Upon such day or upon such other day to which the proceedings shall be regularly adjourned, he shall hear the testimony introduced by the parties and shall examine the alleged mentally ill person, if deemed advisable in or out of court, and render a decision in writing as to such person's mental illness. If such judge cannot hear the application, he may, in his order directing the hearing, name some referee who shall hear the testimony and report the same forthwith, with his opinion thereon, to such judge, who shall, if satisfied with such report, render his decision accordingly. If it be determined that such person is mentally ill, the judge shall forthwith issue his order committing him to the Dannemora state hospital. Such warden or other officer in charge shall thereupon cause such mentally ill person to be delivered to the superintendent of the Dannemora state hospital and such mentally ill person shall be received into such hospital and retained there until legally discharged. Such warden or other person in charge before delivering said mentally ill person shall see that he is bodily clean. At the time of such transfer there shall be submitted to the superintendent of such hospital the original certificate of conviction. If such judge shall

refuse to issue an order of commitment, he shall certify in writing his reasons for such refusal.

5. When an order of commitment is made, such order and all papers in the proceeding shall be presented to the superintendent of the Dannemora state hospital at the time when the mentally ill person is delivered to such institution and a copy of the order and of each such paper shall be filed with the department of mental hygiene and also in the office of the county clerk of the county wherein the court is located which made the order of commitment. The judge shall order all such papers so filed in the county clerk's office to be sealed and exhibited only to parties to the proceedings, or someone properly interested, upon order of the court.

6. The costs necessarily incurred in determining the question of mental condition, including the fees of the medical examiners, shall be a charge upon the state or the municipality, as the case may be, at whose expense the institution is maintained, which has custody of the alleged mentally ill person at the time of the application for his commitment to the Dannemora state hospital, under provisions of this section.

7. During the pendency of such proceeding, the judge may forthwith commit such allegedly mentally ill person to Dannemora state hospital upon petition and the affidavit of two examining physicians that the warden or other officer in charge is not able to properly care for such person at the institution where he is confined, and that such person is in need of immediate treatment.

Added L.1962, c. 393; amended L.1964, c. 105, § 3, eff. March 16, 1964.

Appendix B.

Mental Hygiene Law of New York

§ 73. Court authorization to retain a patient.

1. If no application for a hearing shall have been made by a patient or by anyone on behalf of such patient within sixty days of the initial admission of such patient pursuant to this article, and if the director shall determine that the condition of such patient requires his continued retention in a hospital, he shall, if such patient does not agree to remain in such hospital as a voluntary or informal patient, prior to the expiration of sixty days from the initial admssion of such patient, apply to a court of record in the county where the hospital is located for an order authorizing continued retention of such patient or for his transfer to an appropriate hospital and continued reteniton. The director shall cause written notice of such application to be given the patient and a copy thereof shall be given personally or by mail to the persons required by section seventy-two of this article to be served with notice of such patient's initial admission and to the mental health information service. If no application is made for a hearing on behalf of the patient within five days, excluding Sunday and holidays, from the date such notice of such application was given such patient, and if the mental health information service has not requested a hearing, the court receiving the application may, if satisfied that the patient requires continued retention for care and treatment, or transfer and continued retention, immediately issue an order authorizing continued retention of such patient in such hospital for a period not to exceed six months from the date of the order or if such patient is in a psychiatric hospital operated by a political subdivison of the state or in a general hospital, such order may direct the transfer of such patient to the jurisdiction of the department for retention in a hospital operated by the state or to a li-

censed private institution, to be retained therein for a period not to exceed six months from the date of such order.

2. Upon the demand of the patent or of anyone on his behalf or upon request of the mental health information service, the court shall, or may on its own motion, fix a date for the hearing of the application, in like manner as is provided for hearings in subdivison three of section seventy-two of this article. The provisions of such subdvision shall apply to the procedure for obtaining and holding a hearing and to the granting or refusal to grant an order of retention by the court, except that the patient shall not have the right to designate initially the county in which the hearing shall be held.

3. If the director of a hospital in which a patient is retained pursuant to section seventy-two or subdivisions one or two of this section, or admitted or certified pursuant to the provisions of article five of this chapter prior to September first, nineteen hundred sixty-five shall determine that the condition of such patient requires his further retention in a hospital, he shall, if such patient does not agree to remain in such hospital as a voluntary or informal patient, apply within one year after April first, nineteen hundred sixty-eight or during the period of retention authorized by the last order of the court, to a court of record in the county where the hospital is located, for an order authorizing further continued retention of such patient. The procedures for obtaining any order pursuant to this subdivision shall be in accordance with the provisions of subdivisions one and two of this section. The period for continued retention pursuant to the first order obtained under this subdivision shall authorize further continued retention of the patient for not more than one year and

the period for the further continued retention of the patient authorized by any subsequen order under this subdivision shall be for periods not to exceed two years each. Added L. 1964, c. 738, § 5; amended L. 1968, c. 1050, § 3, eff. June 22, 1968.

§ 74. Review of court authorization to retain a patient

If a person whose retention, continued retention or transfer and continued retention has been authorized pursuant to this article, or any relative or friend in his behalf, be dissatisfied with any such order he may, within thirty days after the making of any such order, obtain a rehearing and a review of the proceedings already had and of such order, upon a petition to a justice of the supreme court other than the judge or justice presiding over the court making such order, who shall cause a jury to be summoned as in the case of proceedings for the appointment of committee for a mentally ill person where the question of fact arising upon the competency of the person is tried by a jury, and shall try the question of the mental illness of the patient so authorized to be retained, in the same manner as provided in said proceedings. Any such patient or the person applying on his behalf for such review may waive the trial of the fact by a jury and consent in writing to trial of such fact by the court. If such petition for rehearing and review be made by any other than the person so authorized to be retained or the father, mother, husband, wife or child of such person or the person with whom the person so authorized to be retained was residing at the time of the making of such order authorizing continued retention or accustomed to reside, before such rehearing or review shall be had, the petitioner shall make a deposit or give a bond, to be approved by a justice of the supreme court, for the payment of the costs and expenses of such rehearing, review and determination of the

question of mental illness by a jury as aforesaid, if the order authorizing continued retention is sustained. If the verdict of the jury, or the decision of the court when jury trial has been waived, be that such person is not mentally ill, the justice shall forthwith discharge him, but if the verdict of the jury, or the decision of the court where a jury trial has been waived, be that such person is mentally ill, the justice shall certify that fact and make an order authorizing continued retention under the original order. Such order shall be presented, at the time of authorization of continued retention of such mentally ill person, to, and filed with, the director hospital in which the mentally ill person is authorized to be retained, and a copy thereof shall be forwarded to the department by such director and filed in the office thereof. Proceedings under the order shall not be stayed pending an appeal therefrom, except upon an order of a justice of the supreme court, and made upon a notice and after a hearing, with provisions made therein for such temporary care or confinement of the alleged mentally ill person as may be deemed necessary. If a judge or justice shall refuse to grant an application for an order authorizing continued retention of a mentally ill person proved to be dangerous to himself or others, he shall state his reasons for such refusal in writing, and any person aggrieved thereby may obtain a rehearing and review and the determination of the question of mental illness by a jury in the same manner and under like conditions as from an order authorizing continued retention. Formerly § 76, amended L.1961, c. 504, § 8; renumbered 74 and amended L.1964, c. 738, § 6, eff. Sept. 1, 1965.

§ 88. Mental health information service

There is hereby created and established a mental health information service of the state of New York in each judicial department of the supreme court. The head of such

service in each judicial department, and such assistants and such staff as may be necessary, shall be appointed and be removable by the presiding justice of the appellate division of such judicial department. Appointments and transfers to such service shall comply with the provisions of the civil service law and except for the head of such service in each judicial department all such positions shall be in the competitive class of the civil service. Standards for qualifications of the personnel in such service having duties requiring direct contact with patients and their immediate families shall be established in agreement with the commissioner. The mental health information service in each judicial department of the state shall perform the following duties subject to directions made and rules and regulations promulgated by the presiding justice of the appellate division of such department;

(a) study and review the admission and retention of involuntary patients;

(b) inform such patients and in proper cases others interested in the patients' welfare concerning procedures for admission and retention and of the patients' right to have judicial hearing and review, to be represented by legal counsel and to seek independent medical opinion;

(c) in any case before a court, to assemble and provide the court with all the relevant information as to the patient's case, his hospitalization, his right to discharge, if any, including information from which the court may determine the need, if any, for the appointment of counsel for the patient or the obtaining of additional psychiatric opinion;

(d) perform services for voluntary patients and informal patients similar to those required under clauses (a) and (b) of this section, as may be requested by the patient or anyone on his behalf;

(e) provide such services and assistance to patients and their families and to the courts having duties to perform relating to the mentally ill or alleged mentally ill as may be required by a judge or justice thereof and in accordance with the regulations of the presiding justice of the appellate division of each such judicial department. Added L.1964, c. 738, § 18, eff. Sept. 1, 1965.

APPENDIX C

Portions of pro se brief filed by respondent in United States Court of Appeals for the Second Circuit.

Summary of Introductory Facts

Relator, for the shooting to death of his wife, was committed to Sing Sing Prison on November 2, 1931, with a sentence of 25 years to life.

Said killing of his wife resulted from her adulterous and extortionate activities.

His conviction of said killing was due largely to the failure of his trial lawyer to produce relator's list of material witnesses imperative to his defense.

He has devoted his energies whole-heartedly, whenever possible, during his incarceration, to preparation for an honorable rehabilitation.

He was transferred from Sing Sing Prison to Attica Prison for having refused to associate himself with an inmate organization of a criminal character.

He was transferred from Attica Prison to Clinton Prison for having refused to bear false testimony against a fellow inmate, contribute to a corruptly motivated fund, and acquiesce in the suppression of his legitimate efforts towards preparation for an honorable rehabilitation.

He was transferred from Clinton Prison to the Dannemora State Hospital for having attempted to submit a deposition to legally constituted authority, citing instances of school-of-crime activities then rampant in Clinton Prison.

His long detention in said hospital has been due to his refusal to connive in the corrupt motivation of his transfer thereto, and to his Keepers' fear that, restored to freedom unhampered by a presumption of insanity, he will proceed to reveal the school-of-crime activities the fiction of insanity was intended to conceal.

The definition of "care and treatment", as dispensed in the Dannemora State Hospital, is a form of penal incarcera-

tion conspicuous for its sadism, brutal assaults, and unprovoked and senseless murder.

Relator believes that these facts, rightly construed, constitute an image of a man who worked hard for a living; who was tricked into a marriage by an unprincipled woman whose only thought was to use said marriage as a vehicle of adultery, exploitation and extortion; who, as a result of her said activities and of his inability to obtain a hearing from the court, was driven to killing her; who, during his subsequent incarceration, turned his attention and energies, by habit, to the end of preparing himself for an honorable rehabilitation; who, in these efforts, has consistently met an unreasonable and sadistic opposition from his Keepers; and whose honesty and honorable tendencies naturally clash with their polar opposites adhered to by his Keepers. These facts, in brief, relator believes, tend to dramatize the inevitable conflict between a code of ethics approved by decent society and one characteristic of those with morally warped minds.

* * *

Relator's Present Comments On Above Quotation.

Inmate cheating in Regents examinations (with the full approval of prison officials) was the least of the charges relator told Dr. Carson was to have been included in his intended deposition. The main charge—which Dr. Carson neglected to mention—was that, with the encouragement and connivance of prison officials, school classrooms in Clinton Prison were then being used to teach criminal activities from safe-cracking to novel methods of robbery, kidnapping and murder. The motive behind sponsorship of these activities (besides, as in the cheating, to make it appear on records that the officials were engaged in commendable work of rehabilitation) was tellingly revealed in a guard's remark on the matter to a fellow guard—"Mak-

ing good citizens of them would be the surest way of working ourselves out of a job."

Relator's intended deposition exposing these activities would likely have precipitated an investigation. This, in turn, would likely have resulted in the dismissal, if not imprisonment, of said officials. Apparently recognizing this probability, said officials, to prevent submission of said deposition, illegally transferred relator to Dannemora State Hospital.

APPENDIX D

Zamansky "Paranoid Reactions" 11 International Encyclopedia of the Social Sciences, pps. 380-385 (1968).

Paranoia is a psychotic disorder that occurs relatively rarely. The delusional structure develops slowly, over a prolonged period, and reaches an extreme degree of organization and rigidity. Delusions are highly systematized and intricately elaborated. Details of the delusional system are often worked out with considerable respect for logic, and the patient may provide a persuasive account of his plight if only the initial premise is conceded. The delusions resist attempts at refutation and alteration and may persist for years. Outside the arena of the delusional system the personality remains relatively intact. There are no hallucinations, there is no general personality disorganization or deterioration, and intellectual functioning is well preserved. The pyschotic features seem, superficially at least, to be isolated from the rest of the personality, and many patients have been able to continue in business or professional activities with unimpaired efficiency. Paranoia is considered to be relatively unresponsive to therapy.

* * *

In addition to the prominence of delusions, the symptom picture in paranoid reactions is rounded out by a number of other traits which may be viewed as reinforcing and maintaining the general delusional structure. The patient displays exaggerated self-reference, perceiving himself as the object of what goes on aroun[redacted]im. He assigns special meanings, consistent with his de[redacted]ions, to the remarks and gestures of others, or to items in newspapers and on the radio, and interprets them as directed toward him personally. Past incidents, too, may be reinterpreted in the light of present beliefs ("retrospective falsification"). There is, however, a considerable degree of selectivity in

the patient's response to his environment. He is reaction-sensitive (Cameron 1959*a*, p. 513), singling out those events, no matter how trivial, which fit into his system of preconceived ideas, while ignoring all disconfirming evidence. He is especially sensitive to attitudes and tendencies of others which coincide with his own impulses and conflicts. His perception of his environment reflects the fact that the paranoid person is almost invariably an intensely hostile person. He is characteristically suspicious and vigilant, living in a world teeming with potential dangers and implied threats. His delusions may lead the patient to outbursts of verbal hostilities and accusations and, much less frequently in direct physical attacks on others.

* * *

PREPSYCHOTIC PERSONALITY AND BREAKDOWN. Paranoid symptomatology may be most profitably regarded as an exaggeration and intensification of personality patterns characteristic of the individual during much of his life. As children and throughout their prepsychotic adult years, paranoid patients are mostly described as having been suspicious, secretive, hostile, resentful, and seclusive. A craving for praise and recognition, coupled with a hypersensitivity to criticism, signifies the presence of profound feelings of inadequacy and insignificance (Schwartz 1963), though not necessarily at a conscious level. Undoubtedly, for some, a vulnerable self-esteem is further threatened by the border-line awareness of homosexual interests or by the guilt and anxiety that accompany destructive fantasies. The refusal to admit their own short-comings and the tendency to blame others for their own difficulties are obvious antecedents of the patients' later more unrealistic use of the mechanisms of denial and projection, suggesting that repression alone had never been a wholly successful defense. Other traits which frequently characterize the life-long behavior of the paranoid individual—aloofness, airs

of superiority and self-importance, arrogance, pride, disdain—may be regarded as related maneuvers to maintain self-esteem. For many persons such an array of defensive traits provides a successful adaptation to potentially threatening impulses and fantasies—successful at least in that the individual is not pressed to the development of a full-blown delusional system.

* * *

PROGNOSIS AND TREATMENT

The prognosis for paranoia is generally unfavorable, especially if treatment is not undertaken until the illness has progressed beyond its early stages. Complete recovery is not the rule, though a number of patients achieve a "social recovery" and do not require hospitalization. The outlook is much brighter for the more transitory paranoid states: spontaneous recovery is not uncommon, and the majority of cases respond partially or completely to treatment.

The differential prognosis for paranoia and paranoid states may be directly related to the different history of the delusional structure in the two disorders. In paranoia, a complex, highly organized delusional system has developed slowly, over a prolonged period of time, establishing itself firmly, after countless reinforcements, as an effective defensive network against a variety of stressful, anxiety-producing situations. Little wonder that it is stubbornly resistant to change. In contrast, the delusions in paranoid states are much more recent and lack the organization and structure to prove wholly effective in binding anxiety and in preserving self-esteem. One might say that these patients have less to lose in discarding their delusions.

The psychotherapy of paranoid reactions, whether on an individual basis or in groups, requires that effective channels of communication be established between the patient and the therapist. It is first necessary to gain the patient's

trust and confidence, a formidable task when confronting someone who believes himself to be surrounded by spies and assassins who are plotting his downfall. The problem of establishing a productive relationship is accentuated by the patient's extereme sensitivity to even the slightest tendencies toward hostility in the therapist. Probably it is best if the therapist is a sincere, sympathetic, and accepting person who indicates that he is interested in understanding the patient's ideas without necessarily subscribing to them. Reasoning and logical refutation are generally ineffective and tend only to increase the patient's vigilance. Ultimately, the patient must experience a sufficient decrease in anxiety to be able to relax his defenses and re-examine his views of the world.

APPENDIX E

STATE OF NEW YORK—DEPARTMENT OF CORRECTION

CLINTON PRISON, DANNEMORA, N. Y.

PER CAPITA COST STATEMENT, showing the population, appropriations, expenditures, unexpended balances and consumption for the fiscal year APRIL 1, 1967 to MARCH 31, 1968

Classification	Appropriations	Expenditures	Balances	Consumption	Per Capital Cost (consumed basis) Per diem	Per annum
PERSONAL SERVICE	$3,668,143.00	$3,647,887.66	$ 20,255.34	$3,647,887.66	$ 6.1147	$2,237.97
MAINT. & OPER.						
Travel	3,165.00	2,844.37	320.63	2,742.60	.0046	1.68
Automotive	5,530.00	5,504.49	25.51	5,714.53	.0096	3.51
General Office	3,180.00	3,167.97	12.03	2,784.46	.0047	1.71
Printing & Adv.	3,440.00	3,429.58	10.42	2,914.31	.0049	1.79
Communication	14,400.00	14,400.00	—0—	12,142.42	.0204	7.45
Fuel	154,350.00	154,201.93	148.07	134,219.38	.2250	82.34
					(.5843)	(213.85)
Food	247,440.00	242,522.59	4,917.41	349,436.35	.5857	214.38
Clothing	87,445.00	87,354.08	90.92	74,743.28	.1253	45.85
Household	26,915.00	26,845.01	69.99	26,665.24	.0447	16.36
Medical	38,900.00	32,025.16	6,874.84	32,057.76	.0537	19.67
Farm & Garden	70,420.00	69,063.80	1,356.20	489.75	.0008	.30
Special Supplies	34,020.00	31,927.84	2,092.16	29,679.97	.0497	18.21
Repairs	26,730.00	26,682.59	47.41	26,095.99	.0437	16.01
Rentals	252.00	252.00	—0—	252.00	.0004	.15
Equipment—Rep'l.	31,819.54	31,819.54	—0—	31,819.54	.0533	19.52
Equipment—Add'l.	5,948.37	5,948.37	—0—	5,948.37	.0100	3.65
MAINT. UNDIST. Inmates' Wages	33,706.95	33,706.95	—0—	33,706.95	.0565	20.68
Total M. & O.	787,661.86	771,696.27	15,965.59	771,412.90	1.2930	473.26
GRAND TOTAL	$4,455,804.86	$4,419,583.93	$ 36,220.93	$4,419,300.56	$ 7.4077	$2,711.23

Average inmate population 4/1/67 to 3/31/68	1,630
Average number of personnel receiving maintenance	4
Actual inmate population on March 31, 1968	1,338

Personnel: Maintenance 470; Industry 17

CLINTON PRISON

Appendix E.

STATE OF NEW YORK—DEPARTMENT OF CORRECTION

DANNEMORA STATE HOSPITAL

and

CLINTON PRISON DIAGNOSTIC & TREATMENT CENTER

Classification	Appropriations	Expenditures	Balances	Consumption	Per Capital Cost (consumed basis) Per diem	Per annum
PERSONAL SERVICE*	$3,749,632.00	$3,382,902.18	$366,729.82	$3,382,902.18	$18.6725	$6,834.15
MAINT. & OPER.						
Travel*	4,080.00	2,887.26	1,192.74	2,856.63	.0158	5.77
Automotive	820.00	817.89	2.11	841.68	.0046	1.70
General Office*	3,630.00	3,623.05	6.95	3,468.28	.0192	7.01
Printing & Adv.*	875.00	864.86	10.14	907.14	.0050	1.83
Communication*	8,610.00	8,555.40	54.60	8,731.79	.0482	17.64
Fuel*	105,785.00	103,544.21	2,240.79	104,130.13	.5748	210.36
Food*	99,950.00	84,850.94	15,099.06	115,581.52	×(.6180) .6380	(226.19) 233.50
Clothing*	16,715.00	16,713.46	1.54	15,618.79	.0862	31.55
Household*	10,235.00	10,229.42	5.58	12,383.91	.0684	25.02
Medical*	24,045.00	21,389.20	2,655.80	20,498.40	.1131	41.41
Farm & Garden	750.00	749.55	.45	836.76	.0046	1.69
Special Supplies*	134,162.00	120,131.86	14,030.14	119,947.25	.6621	242.32
Repairs	12,150.00	12,150.00	—0—	12,463.56	.0688	25.18
Equip.—Rep'l.	1,977.12	1,977.12	—0—	1,977.12	.0109	3.99
Equip.—Add'l.*	13,197.08	13,197.08	—0—	13,197.08	.0728	26.66
MAINT. UNDIST.						
Inmates' Wages*	14,347.66	14,437.66	—0—	14,437.66	.0797	29.17
Total M. & O.*	451,418.86	416,118.96	35,299.90	447,877.70	2.4722	904.80
GRAND TOTAL*	$4,201,050.86	$3,799,021.14	$402,029.72	$3,830,779.88	$21.1447	$7,738.95

× Based on average total fed — 442 + 69 = 511

Average inmate population 4/1/67 to 3/31/68 *426 + 69 = *495
Average number of personnel receiving maintenance 20
Actual inmate population on March 31, 1968 *383 + 101 = 484

Personnel: Maintenance = 367 + 81 = 448

* Includes both Dannemora State Hospital and Clinton Prison Diagnostic & Treatment Center.